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No. 01-___

In The Supreme Court Of The United States

OHIO ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

MICHAEL D. NIHISER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In Section 504 of the Rehabilitation Act of 1973, Congress prohibited any "program or activity receiving Federal financial assistance," including any State program, from discriminating against any person on the basis of disability, and in 1987 Congress extended that prohibition to cover an entire State department or agency if the agency receives any federal funds. 29 U.S.C. 794. Aggrieved individuals have a private cause of action.

In the Rehabilitation Act Amendments of 1986, Congress stated that "[a] State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of " the Rehabilitation Act. 42 U.S.C. 2000d-7.

The questions presented are

1. Does Section 2000d-7 constitute an unambiguous invitation to States to waive their Eleventh Amendment immunity, and if so, does a State clearly declare its intent to waive a State agency's immunity merely by virtue of that agency's acceptance of federal funds?

2. Does the Spending Clause allow Congress constitutionally to compel a State or a State agency, as a condition for receiving funds for *any* purpose, to waive its Eleventh Amendment immunity from suits under Section 504 of the Rehabilitation Act?

PARTIES TO THE PROCEEDING

Petitioner is the Ohio Environmental Protection Agency (Ohio EPA).

Respondent Michael D. Nihiser is a former Ohio EPA employee.

Respondent United States intervened in the Court of Appeals to defend the federal statutes involved.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of defendant Ohio Environmental Protection Agency, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 269 F.3d 626. Pet. App. 1a-6a. The opinion of the district court is reported at 979 F.Supp 1168. Pet. App. 8a-27a.

JURISDICTION

The court of appeals entered judgment on October 11, 2001. The court of appeals denied a timely petition for rehearing on December 5, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8, Clause 1 of the United States Constitution states:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . ..

2. The Eleventh Amendment to the United States Constitution states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, states in relevant part:

Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of -

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government . . . .

4. The Rehabilitation Act Amendments of 1986, 42 U.S.C. 2000d-7(a), provides:

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the

Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

INTRODUCTION

This case presents two critically important issues regarding the States' Eleventh Amendment immunity from suit in federal court: (1) whether a federal statute purporting to *abrogate* State immunity can alternatively be read as a Congressional "invitation to waive," with such waiver occurring automatically when a State accepts federal funds; and (2) if so, whether Congress can compel a State to waive an agency's, or even the entire State's, Eleventh Amendment immunity as a condition for receiving *any* federal money, no matter how unrelated the funds are to the statute for which immunity is waived. These questions are critical in several respects, as the loose threads contained in these questions threaten to unravel the entire fabric of this Court's recent federalism jurisprudence.

Because the States' sovereign immunity is a vital part of our federalist system, the Court's cases properly protect the States from unintended or unjustified abrogation of its immunity by Congress. Thus, in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court held

that Congress can abrogate, or unilaterally override, the States' immunity only with the clearest, unambiguous statement of its intent to abrogate. And in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court held that Congress's power to abrogate is limited to situations where Congress is empowered by Section 5 of the 14th Amendment to enforce constitutional rights.

In sharp contrast to the abrogation route, which is centered on Congress's intent and power, a waiver of immunity is—or at least should be—centered on the State, and Congress's role in the process, while allowed, is limited in ways different from the abrogation context. Thus, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), this Court reaffirmed that Congress can, as an *alternative to abrogation*, invite States to waive their immunity, and it may use federal funds to entice such a waiver, but such a bilateral process requires *two clear statements*. *First*, Congress must clearly and unequivocally state that it is inviting a waiver, as opposed to unilaterally declaring an abrogation. *Second*, the State must clearly accept that invitation, *i.e.*, such a waiver cannot be constructive or implied, but must be result from a State's "clear declaration." In detailing how this bilateral invitation-and-waiver track differs from the abrogation route, the Court noted that any purported waiver that resulted from *Congress's unilateral statement*—whether called "forced waiver" or "constructive waiver" or any other name—is really no waiver at all, but is just abrogation by another name.

Finally, the waiver process is limited not only by the above *procedural* need for clarity in all respects, but also, when Congress entices the waiver with federal funds, its *power* to "purchase" a waiver is constitutionally

circumscribed. When Congress uses its Spending Clause power to induce the States to waive immunity, the arrangement must satisfy the requirements of *South Dakota v. Dole*, 483 U.S. 203 (1987). Among other things, *Dole* requires that the federal funding at issue must be related to the requested change in State behavior—here, a waiver of immunity from Rehabilitation Act suits—and the funding condition must not be coercive.

This case implicates all of these doctrines, directly or indirectly, and the decision below threatens to undercut all of the above protections of State immunity. First, the statutory question presented—does Section 2000d-7 invite States to waive, and did the Ohio EPA waive here—warrants review because the approach taken by the Sixth Circuit, along with several other circuits, conflicts with *College Savings's* instruction that waiver, unlike abrogation, focuses on State intent. The court below and others have now, after years of calling Section 2000d-7 a unilateral *abrogation* provision, shifted terminology to say that Congress, by enacting 2000d-7, "waived" the States' immunity. Decisions such as the one below stand in conflict with *College Savings*, as they completely ignore the requirement that a State, not Congress, clearly declare a waiver. This issue has also split the circuits, as the Second Circuit has, relying on *College Savings*, held that a State did *not* waive its immunity in certain circumstances when it accepted federal funds.

The constitutional question presented—whether Congress has the Spending Clause *power* to extract the type of waiver found by the Sixth Circuit—also has drastic consequences for federalism. While *Dole* requires that Spending Clause legislation show some "relatedness" between the federal funds and the State action that the funds "purchase," the situation here eviscerates that

requirement. In this case, the Ohio EPA purportedly waived its immunity from *disability discrimination suits* solely by receiving *environmental cleanup funds*. These subjects are so plainly unrelated that this case does not ask what the "outer bounds" of relatedness are, *see Dole*, 483 U.S. at 208 n.3, but it in effect asks whether any outer bounds exist at all.

Finally, although this case does not directly involve the Court's abrogation cases under Section 5 of the 14th Amendment, the practical effect here is to undercut cases such as *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001). That is because the limitations on lawsuits under the Americans with Disabilities Act in federal courts are meaningless if plaintiffs can simply repackage the identical claims under the Rehabilitation Act instead. Further, if Congress's power to link *any* type of waiver of immunity to *any* federal funds is unchecked, then Congress could simply amend Section 2000d-7 to add "waivers" under the Age Discrimination in Employment Act, the Patent Remedy Act, and any other statute that failed to pass muster under the Section 5 abrogation cases, thus undoing the results in *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999); and any other Section 5 cases.

Because all of these issues are vital to the protection of federalism, the Court should grant certiorari in this case.

STATEMENT

1. Respondent Michael Nihiser began working for the Ohio Environmental Protection Agency ("Ohio EPA") in 1978. From 1981, his job duties remained constant, though he was promoted and reclassified. Those duties involved extensive driving to remote sites within Ohio to investigate environmental law violations. Nihiser injured his back while on the job in 1986, and the agency attempted to accommodate his condition. Meanwhile, Nihiser was increasingly reprimanded for lack of productivity: for example, in one month he failed to complete even a single set of investigative findings—even though he had twenty-two pending investigations and even though he worked 40% of his usual schedule that month.

Ultimately, Nihiser was pronounced to be disabled from the long-distance driving aspect of his job. He obtained disability benefits from the public employees' retirement fund, but he continued to seek further accommodation. He sought to convert his job to an entirely non-driving position, and when the Ohio EPA disagreed on whether such an accommodation was reasonable (given the need to examine environmental problems on-site), Nihiser sued.

2. In 1994, Nihiser sued the Ohio EPA in the United States District Court for the Southern District of Ohio, alleging violations of Title I of the Americans with Disabilities Act (ADA) and Section 504 the Rehabilitation Act. The district court granted the Ohio EPA's motions to dismiss all counts on Eleventh Amendment immunity grounds. The court found that Congress did not validly abrogate State immunity under the ADA, although Congress expressly stated its intent to do so. The district court held, as this Court later did in *Garrett*, 531 U.S. 356,

that Congress was not empowered to abrogate under Section 5 of the Fourteenth Amendment. Likewise, the district court held that Congress could not validly abrogate State immunity under the Rehabilitation Act. The district court also held that the Ohio EPA did not waive its immunity under either Act.

3. In the district court, Nihiser provided evidence that the Ohio EPA received federal funding from the U.S. Environmental Protection Agency (U.S. EPA) and the U.S. Department of Energy. Those funds were granted for an environmental monitoring project and for other purposes related to protecting and improving the environment, and the money went to divisions other than the one in which Nihiser worked. No evidence suggested that the Ohio EPA received funding connected to the purposes of the Rehabilitation Act or related to employment of the disabled.

4. Nihiser appealed, and the United States intervened to defend the constitutionality of the federal statutes. Nihiser abandoned the waiver argument, and he argued only that Congress validly abrogated State immunity under both the ADA and the Rehabilitation Act. The United States argued for abrogation under both laws, and it argued that the Ohio EPA waived its immunity under the Rehabilitation Act.

After initial briefing, the Sixth Circuit consolidated the case with other cases from Ohio, Tennessee, and Michigan that raised similar issues under the ADA and/or the Rehabilitation Act, and it set the cases for consolidated argument. Shortly before the October 1999 argument, both the United States and the States sought and received the court's permission to file supplemental briefs addressing this Court's then-new cases regarding Eleventh

Amendment immunity. Among those cases were *College Savings*, 527 U.S. 666, which addressed waiver of immunity, and *Florida Prepaid*, 527 U.S. 627, which addressed abrogation.

After argument, the Sixth Circuit stayed the case for over a year pending this Court's decision in *Garrett*.

5. The Sixth Circuit reversed the district court solely on the waiver issue as to the Rehabilitation Act, as it found such a waiver.[1] The court found such a waiver in Title 42, Section 2000d-7 of the U.S. Code, which provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." The court said that "[t]he U.S. Supreme Court, as well as every circuit court to address the question, has recognized Section 2000d-7 as a valid and unambiguous waiver," and in support of this assertion, it cited this Court's decision in *Lane v. Pena*, 518 U.S. 187, 200 (1996), along with decisions from the Seventh, Eighth, and Ninth Circuits. The appeals court denied the Ohio EPA's petition for rehearing. Pet. App. 7a.

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[1] The court of course affirmed the dismissal of the ADA claim, as *Garrett* directed, and in light of its waiver holding, it did not reach the question whether the Rehabilitation Act validly abrogated State immunity.

REASONS FOR GRANTING THE PETITION

I. The Court should review whether Section 2000d-7 clearly invites the States to waive immunity, and whether a State's acceptance of federal funds amounts to a declaration of waiver.

The Court should review this question because the Sixth Circuit's decision conflicts with this Court's decision in *College Savings*, and because the circuits are now split on whether a State's acceptance of federal funds necessarily waives the State's immunity.

A. The Sixth Circuit decision conflicts with this Court's immunity decisions.

The Sixth Circuit's decision violates this Court's precedents, especially *College Savings*, in several respects. As detailed below, this Court has explained the fundamental distinction between *abrogation*, which results from a unilateral declaration by Congress, and *waiver*, which results from a clear declaration *by the State*. This Court's decisions leave no room for finding a "Congressional waiver of State immunity"—yet that is what the Sixth Circuit purported to find here. The appeals court held that it "recognized Section 2000d-7 as a valid and unambiguous waiver"—but the entire idea of "waiver" by a Congressional statute surely conflicts with *College Savings*. Further, even if Section 2000d-7 is viewed as a potential invitation to waiver, rather than as a self-executing waiver, it still fails to satisfy this Court's precedents. That is because this Court requires any "invitation to waive" to be an unambiguous statement of such an invitation, and Section 2000d-7 has always been recognized by this Court as a clear statement of abrogation.

1. *College Savings* draws a sharp line between Congressional abrogation and a State's voluntary waiver: while abrogation can be unilaterally declared by Congress, a State's waiver must be clearly declared by the State.

In *Atascadero*, this Court explained that under the "clear statement" rule, any Congressional abrogation of State immunity would not be lightly inferred, as "Congress must express its *intention to abrogate* the Eleventh Amendment in unmistakable language in the statute itself." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985) (emphasis added). Notably, this language requires that Congress's intent must be a specific intent—an "intention to *abrogate*"—not merely a general intent to get the State into federal court by any of several alternative paths.

While *Atascadero* explains how Congress may unilaterally abrogate by issuing its own clear statement, *College Savings* sets an entirely different set of ground rules that apply in the very different waiver context. The Court explained that any search for a waiver begins with the fundamental principle that a waiver must ultimately come from the State itself; it must be "altogether voluntary," as shown by the State's own "clear declaration" of waiver. *College Savings*, 527 U.S. at 675-76. These principles required the Court to reject the doctrine of implied or "constructive waiver," under which a State could *implicitly* waive its immunity by, for example, entering a field subject to Congressional regulation. *Id.* at 680, overruling *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964). The "whole point of requiring a clear declaration *by the State* of its waiver is to be certain

that the State in fact consents to suit." *College Savings*, 527 U.S. at 680 (emphasis in original).

Of course, since a State's waiver is effected only by the *State's* declaration, any Congressional statement on the subject can not be a unilateral statement *effecting* a waiver, but can at most be an "invitation to waiver," and it must be a true invitation that the State is free to accept or decline. But if Congress presents the deal unilaterally—*i.e.*, if it simply announces that waiver shall be constructively exacted when the State takes some act that it already has every right to take—then such a "forced waiver" is no "invitation to waive" at all, but is "little more than abrogation under another name." *Id.* at 684. As the Court noted, the equivalence of abrogation and "forced waiver," as opposed to a true "invitation to waive," was best shown in *College Savings* by the "revealing fact[]" that the "statutory provision relied upon to demonstrate that Florida constructively waived its sovereign immunity is the *very same provision* that purported to abrogate it." *Id.* (emphasis added).

Although the Court in *College Savings* rejected the idea that Congress had the power to extract a State's waiver by threatening to sanction the State for its refusal to waive, the Court acknowledged that Congress retains the *constitutional power* to condition a grant of federal funds on a State's waiver of immunity, as funding is a gift to which a State is not entitled. Importantly, however, while *College Savings* endorses this power under the Spending Clause, that part of the opinion does not in any way undercut the *procedural* requirement that *any* State waiver must still be shown by a State's own clear declaration.

Further, *College Savings*, by incorporating *Dole's* restrictions on the Spending Clause power when that power

is used to entice waiver, incorporates yet another clear statement rule: that Congress must *clearly state that it is inviting the State to waive*. Under *Dole*, "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207. This rule is not only explicit in *Dole*, but it also is logically required by *College Savings's* requirement of a knowing and voluntary waiver, as a State can not "clearly" accept an invitation if it never knew in the first place that it was clearly invited, or if it never knew that it was free to accept or decline.

In sum, the unmistakable lessons of *College Savings* are these: questions of waiver are ultimately centered on the State's intent, not just Congress's intent; and a focus on Congressional dictates is the hallmark of abrogation, not waiver. A State's waiver must be clearly declared, and if the waiver is in response to an enticement by federal spending, then the Congressional "invitation to waive" must unequivocally state that it is a conditional offer to States. Anything less violates *College Savings*, and as shown below, the Sixth Circuit's decision broke all of these rules.

2. The Sixth Circuit's decision conflicts with *College Savings* by finding a "Congressional waiver" and by ignoring the need for a clear declaration by the State.

Under *College Savings*, a waiver-enticed-by-federal-funds is a bilateral process with clarity on both sides: Congress unequivocally states the invitation and condition, and the State clearly declares its assent and its waiver. But here, the Sixth Circuit blurred the crucial

distinction between unilateral abrogation and the bilateral invitation-and-waiver process, as it based its finding of waiver *solely upon Congress's statement in Section 2000d-7*, without even asking whether the State clearly declared its intent to waive. The Sixth Circuit simply stated that, "we find that Section 2000d-7 is 'the most express language' of waiver of Eleventh Amendment immunity." Pet. App. 6a. The court also said that it agreed with other courts that had purportedly "recognized Section 2000d-7 as a valid and unambiguous waiver." *Id.*

These statements characterizing Section 2000d-7 as an "express waiver" make no sense at all—and this is true even if the Sixth Circuit's ultimate judgment is correct, and even if we are somehow wrong on all of our other points—for the simple reason that Congress can never, under any theory, "waive" a State's immunity. As explained above, Congress can either (1) abrogate or (2) invite a State to waive, but it cannot by itself effect a waiver. Indeed, this observation does not rest on any new development in immunity law, but is nothing more than an application of the common-sense truism that no one can waive another's rights.

Further, the Sixth Circuit's decision shows that its erroneous reference to Congressional "waiver" was not simply a poor choice of words, but that the court flatly ignored *College Savings's* insistence that a finding of waiver requires evidence that the *State* "clearly declared" its intent to waive. In *College Savings*, the Court said plainly that a waiver could never be based solely on Congress's words, as there is "a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *College Savings*,

527 U.S. at 680-81. This observation remains true *even if* those Congressional words are a clear invitation to waiver—and as shown below, Section 2000d-7 is not even a clear invitation. But no matter how clearly Congress expresses its intention, a court must still find that the State declared its waiver—and the Sixth Circuit, in defiance of *College Savings*, simply skipped that step entirely. Indeed, the court did not even *cite College Savings*.

Further, the Sixth Circuit did not look for any clear statement of waiver by the State *on the facts of this case*, nor did it even expressly assert that acceptance of federal funds somehow constitutes a clear statement of waiver. The court mentions federal funding in only two places in its opinion, and in both places it does so in the abstract, without referring to the facts here. At the beginning of its waiver analysis, the court said that

> Nihiser and the United States as intervenor present two possible methods for Rehabilitation Act claims against States to proceed notwithstanding Eleventh Amendment immunity: 1) pursuant to Congress's spending power, *waiver via the federal funds tied to the Rehabilitation Act*, and 2) congressional abrogation pursuant to Section Five of the Fourteenth Amendment

Pet. App. 4a (emphasis added). And after concluding its waiver analysis, the court said it need not reach the abrogation issue in light of its finding that "States waive their Eleventh Amendment immunity with regard to Rehabilitation Act claims *when they accept federal funds*." Pet. App. 6a (emphasis added). These scant references to federal funds, without any link to what the State did or said

here, show that the court looked only to what Congress unilaterally decreed.

The facts on the record here further illustrate the court's error, as the undisputed facts show that the Ohio EPA never received any "federal funds tied to the Rehabilitation Act," as the Sixth Circuit implicitly suggested in the first funding reference above; rather, the only federal funds that the agency received were environmental cleanup and monitoring funds from the U.S. EPA and the U.S. Department of Energy. Indeed, the United States argued to the court specifically that *any* federal funds trigger a waiver, not just funds tied to the Rehabilitation Act or its purposes.

Thus, the entire framework of the Sixth Circuit's opinion contradicts the waiver paradigm detailed in *College Savings*, and this completely errant approach warrants review.

3. Section 2000d-7 is not an unambiguous "invitation to waiver," as it has long been understood as an abrogation provision.

This case also merits review because, as further explained in Section B below, several courts have, like the Sixth Circuit, erred in viewing Section 2000d-7 as a "waiver" provision. As explained above, Section 2000d-7 cannot by itself "constitute" a waiver, because only the State can waive its own immunity. Thus, at most, Section 2000d-7 could serve as an unambiguous "invitation to waive," which would still require State consent to consummate the waiver. But even if the statute is measured for its potential in the "invitation" role, it falls far short of the mark. Any purported characterization of Section 2000d-7 as an invitation to waiver cannot be

squared with the plain language of the statute, nor can it be reconciled with this Court's repeated recognition that Section 2000d-7 clearly expresses Congress's intent to *abrogate* the States' immunity from claims under each of the four statutes listed.

On its face, Congress's statement is couched as a command rather than as an invitation or a condition: a "State shall not be immune." This plain "shall not be immune" language surely looks more like a Congressional dictate than a proposal, and it resembles the abrogation provisions found in the Americans with Disabilities Act and the Trademark Remedy Clarification Act.

Indeed, this Court has repeatedly described Section 2000d-7 as a clear and unambiguous statement of abrogation. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72 (1992) ("In the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. 2000d-7, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975"); *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274, 284 (noting Congress's "abrogation of the States' Eleventh Amendment immunity under Title IX" in Section 2000d-7); *Alexander v. Sandoval*, 532 U.S. 275, 280 (noting that Section 2000d-7 "expressly abrogated States sovereign immunity against suits brought in federal court to enforce Title VI ").

Further, the circuit courts also routinely described Section 2000d-7 as an abrogation provision. *See Doe v. County of Centre*, 242 F.3d 437, 457 (3d Cir. 2001); *Kilcullen v. New York State Dep't of Labor*, 205 F.3d 77, 82 (2d Cir. 2000); *Lesage v. State of Texas*, 158 F.3d 213, 216 (5th Cir. 1998), reversed in part on other grounds, 528

U.S. 18 (1999); *Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, 126 F.3d 589, 604 (4th Cir. 1997), judgment vacated on other grounds, 524 U.S. 935 (1998); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) ("Congress has unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity for Title IX claims, see 42 U.S.C. § 2000d-7(a)(1)") *cf. Dekalb County Sch. Dist. v. Schenko*, 109 F.3d 680, 688 (11th Cir.), cert. denied, 522 U.S. 1015 (1997) (finding that the parties agreed that states' immunity was abrogated for causes of action grounded in Title VI).

In describing Section 2000d-7 as a "waiver provision," the Sixth Circuit mistakenly relied upon the notion that this Court "recognized Section 2000d-7 as a valid and unambiguous waiver" in *Lane v. Pena*, 518 U.S. 187, 200 (1996). To be sure, this Court did use "waiver" language in dicta in *Lane*, but a careful review of the context in *Lane* shows that the only plausible reading is that the Court meant "abrogation." In *Lane*, the issue was whether the federal government has waived *its own immunity* in Section 2000d-7, and in describing how Congress did not waive its own immunity, the Court cited Section 2000d-7 as the type of language that satisfies the "clear statement" rule of *Atascadero*.

Notably, the *Lane* Court repeatedly described Section 2000d-7 as a response to *Atascadero*, which had "held that Congress had not unmistakably expressed its intent to *abrogate* the States' Eleventh Amendment immunity in the Rehabilitation Act." *Id.* at 198 (emphasis added); *see id.* at 200. Having described *Atascadero* as an instruction to Congress that any *abrogation* requires a clear statement, the Court went on to say that by enacting Section 20007-d, "Congress sought to provide the sort of unequivocal *waiver* that our precedents demand." *Id.* at

198 (emphasis added). Thus, the Court appears to have used the terms "abrogation" and "waiver" interchangeably at that point, perhaps because of the shifting references to waiver of federal immunity with "waiver"/abrogation of State immunity.

But whatever the reason for the usage, this language in *Lane* should properly be read as referring to abrogation, as such a reading makes more sense in context. In this way, *Lane's* view of Section 2000d-7 as an abrogation provision is perfectly consistent with *Franklin, Gebser*, and *Sandoval*, as well as with *College Savings's* common sense reminder that Congress cannot "waive" State immunity.[2]

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[2] Indeed, the Sixth Circuit itself, in an earlier case that concluded that Section 2000d-7 was a clear abrogation provision, quoted the above-cited language in *Lane* as support for that holding, and the Sixth Circuit even substituted the word "abrogation," in brackets, for Lane's usage of "waiver." The passage, with original cites and punctuation, reads:

> To satisfy the first *Seminole Tribe* requirement, Congress must have made its intention to abrogate immunity "unmistakably clear in the language of the statute." *Seminole Tribe*, 517 U.S. at 56 (quotation omitted). 'In view of the explicit language of § 2000d-7(a)(1) quoted above, Congress clearly satisfied the first requirement. *See Lane v. Pena*, 518 U.S. 187, 116 S. Ct. 2092, 2099 (1996) ("By enacting [§ 2000d-7,] Congress sought to provide the sort of unequivocal [abrogation] that our precedents demand.").

Finally, the Sixth Circuit's shifting characterization of Section 2000d-7 from an "unambiguous" abrogation provision to an "unambiguous" invitation-to-waiver provision violates not only this Court's precedents, but violates the dictionary definition of "unambiguous." *Webster's* defines "ambiguous" as "liable to more than one interpretation" or "uncertain or indefinite." But here, Respondents expressly urged that Section 2000d-7 could be interpreted to satisfy *either* the requirement for unambiguous abrogation *or* the requirement for an unambiguous condition of waiver, each of which independently requires that the relevant statement be *un*ambiguous. *See* Pet. App. 4a (noting that the United States and Nihiser "argue that the Rehabilitation Act Amendments [of 1986] provide the necessary language to avoid Eleventh Amendment immunity under *either theory*." (emphasis added). The Sixth Circuit, by endorsing this either-or approach to "unambiguous" intent, conflicts in the most direct way with this Court's insistence on clarity in the immunity field, and that inconsistency merits this Court's review.

Franks v. Kentucky School for the Deaf, 142 F.3d 360, 362 (6th Cir. 1998).

B. The circuits are split on whether a waiver occurs when a State agency accepts federal funds in light of Section 2000d-7.

The Sixth Circuit, in finding that Section 2000d-7 leads to a waiver of State immunity, has joined the Seventh, Eighth, and Ninth Circuits, which have also held that States or State agencies have waived their immunity from Rehabilitation Act claims by accepting federal funds. *See Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000); *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1999); *Douglas v. California Dep't of Youth Authority*, 271 F.3d 812 (9th Cir. 2001).

But in contrast to those circuits, the Second Circuit has recently held that a New York agency did *not* waive its immunity from Rehabilitation Act claims, and in reaching that conclusion, the Second Circuit identified the critical flaw in the reasoning of the other Circuits. *See Garcia v. S.U.N.Y. Health Sciences Center*, 2001 U.S. App. Lexis 21366 (Sept. 25, 2001). In *Garcia*, the court agreed with the other circuits that Section 2000d-7 expresses *Congress's* clear intent to have the States waive immunity (an erroneous position in our view), but the court said that finding such clear intent is only the first step of a two-step process. After Congress invites a State to waive, the State must then express *its* clear intent to accept that invitation. The *Garcia* court cited this Court's teaching in *College Savings* that

> there is a fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress's expressing unequivocally its intention that if the State takes certain action [*e.g.*, accepting

> federal funds] it shall be deemed to have waived that immunity.

Garcia, 2001 U.S. App. Lexis at *33-34, quoting *College Savings*, 527 U.S. at 680-81 (bracketed material in *Garcia*).

Having found that it must look at the State's intent as well as Congress's, the Second Circuit then examined whether the New York agency did in fact waive its immunity by accepting federal funds, and it concluded that it did not waive. The court noted that any waiver is a relinquishment of a known right, and it reasoned that New York could not have known that it had any immunity to waive in the early 1990s, because of the interplay between the Rehabilitation Act and the ADA. "At the time New York accepted the conditioned funds, Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity under Congress's Commerce Clause authority." Further, since "the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity . . . since by all reasonable appearances state sovereign immunity had already been lost." *Id.*

While the Second Circuit is the only one to depart *in result* from the majority view adopted by the Sixth Circuit in this case, the split here warrants review because the majority of the circuits have conflicted with this Court's decisions in the same way that the Sixth Circuit did. That is, the problem in several circuits is not just that they reached the wrong *answer* on whether the State waived, but that like the Sixth Circuit, those other circuits did not even ask the right *question*. As the Second Circuit noted, they "focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and

whether the state in fact received the funds. None of these cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful, as the Supreme Court required in *College Savings*."

Finally, the statutory question presented here warrants review in light of the constitutional question presented. That is, because there is a substantial constitutional question regarding Congress's *power* to link federal funds to an immunity waiver outside the funded program, the statute here should be construed in a way that avoids difficult constitutional questions.

II. The Spending Clause issue warrants review because the decision below, in holding that Ohio waived its immunity from disability discrimination suits when it accepted environmental cleanup funds, simply eviscerates the "relatedness" requirement of *South Dakota v. Dole*.

Even if the Sixth Circuit was right in concluding that Ohio knowingly waived its immunity in this case, the decision below still warrants review because of its implicit holding that such a waiver is constitutionally valid under *College Savings* and *South Dakota v. Dole*. In *Dole*, the Court affirmed that Congress could use its Spending Clause power to achieve indirectly what it could not do directly under other enumerated powers, but the Court also outlined several principles limiting that power. 483 U.S. at 207-11. In *College Savings*, the Court specified that *Dole's* limits apply to Congressional attempts to purchase a waiver of State immunity. The decision below, by allowing a waiver in extreme circumstances, leaves *Dole* in shreds, and eliminates any meaningful limits on the Spending Clause.

In this case, the most important *Dole* requirement—for it was the most clearly violated—is the requirement of "relatedness" between the funding at issue and the corresponding condition imposed on the State. *Dole* held that "conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." *Dole*, 483 U.S. at 207. The Court noted in *Dole* that "[o]ur cases have not required that we define the outer bounds of the 'germaneness' or 'relatedness' limitation," and the Court declined to define those outer bounds in *Dole*. This case involves such a blatant lack of nexus that it does not test the "outer bounds" of relatedness, but it instead squarely asks whether any outer bounds exist at all.

Here, no one even asserted that the Ohio EPA received any money connected to the purposes of the Rehabilitation Act or to employment of the disabled. Rather, Respondents relied solely on the Ohio EPA's receipt of funds for environmental cleanup or monitoring. Those funds came from the U.S. EPA and the U.S. Department of Energy, and the money went to divisions other than Nihiser's.

Indeed, the court below was fully informed that such a complete lack of relatedness was at issue, as the United States' briefs not only relied on Nihiser's earlier identification of the environmental funds, but its briefing also forthrightly informed the Sixth Circuit that in its view *any* federal funding of the Ohio EPA would trigger the asserted waiver, without regard to the subject matter of the funds. *See* Supplemental Brief of the United States at 14 n.11 ("While Section 504 was initially enacted as part of a spending statute, its text makes clear that it was not intended to be tied to those [Rehabilitation Act] funds in

particular."); *id.* at 16 (Rehabilitation Act requirements are a "valid condition on the receipt of all federal financial assistance"). These assertions, coupled with the Ohio EPA's arguments that *Dole* was not satisfied by such unrelated funding, should have left the court with no doubt that this case squarely posed the question of wholly unrelated funding.

Indeed, in light of the clarity of the legal issue, coupled with the undisputed facts, the Sixth Circuit's failure to discuss the *Dole* issues should not be a barrier to this Court's review. Both the Ohio EPA and the United States fully argued the issue in the pre-argument supplemental briefing, which both sides requested for the purpose of addressing then-new cases such as *College Savings*. (Respondent-Plaintiff Nihiser had abandoned the waiver issue on appeal, relying instead on abrogation arguments as to both the Rehabilitation Act and the ADA.) The United States, although arguing that the issue was not a live one at that supplemental stage, devoted seven of its twenty pages to the Spending Clause issue. This full coverage was not in response to the Ohio EPA's supplemental brief, as the briefs were filed simultaneously. Instead, the exploration of this issue was triggered by the changing legal landscape, exemplified by this Court's *College Savings* decision (which was this Court's first decision linking *Dole* to the waiver-of-immunity context) and the Eighth Circuit's then-new panel decision finding that waiver under the Rehabilitation Act and Section 2000d-7 was invalid under the Spending Clause. *See Bradley v. Arkansas Dep't of Educ.*, 189 F.3d 745 (1999), overruled *en banc sub. nom. Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000), cert. denied, 121 S. Ct. 2591 (2001).

The lack of relatedness here was not the only violation of *Dole*, as the broad scope of the "any funding at all" standard, along with Sixth Circuit's inexplicable decision to treat the waiver as a *statewide* one, rather than agency-wide, also makes the arrangement here "so coercive as to pass the point at which pressure turns into compulsion." *College Savings*, 527 U.S. at 687, quoting *Dole*, 483 U.S. at 211. If Congress linked its "purchased waivers" to related funding, then the Ohio EPA would not need to forgo *all* federal funds in order to preserve its immunity in one or more areas, but it would only need to forgo the linked funds. But the "any funds at all" standard makes each agency, at a minimum, give up all federal funds.

The Sixth Circuit multiplied the coercion problem exponentially by holding that the entire State of Ohio waived its immunity, not just the Ohio EPA—despite the United States' urging that any waiver must be limited to the agency at issue. *See* United States Supp. Br. At 16-17. The court's holding was not explained or justified, but the court concluded broadly that "States waive their Eleventh Amendment immunity" when "they" accept federal funds, Pet. App. 6a. The court nowhere looked to the Ohio EPA's acts or statements, nor did it suggest its holding was limited to that agency.

The Sixth Circuit's holding of *statewide* waiver in this case was recently confirmed in another published decision, *Carten v. Kent State Univ.*, 2002 U.S. App. Lexis 2858 (6th Cir. Feb. 25, 2002). In *Carten*, the Sixth Circuit said plainly that it had already "concluded that Ohio unambiguously waived" its immunity in its *Nihiser* decision, so it allowed a Rehabilitation Act to go forward against Kent State University. But if the court meant to require a separate waiver for each agency, it would have

needed to at least ask whether Kent State received a single federal dime, rather than relying on a decision against the Ohio EPA.

The Sixth Circuit's *statewide* waiver approach surely violates *Dole's* prohibition against coerciveness, as it means that if Ohio wants to preserve its immunity from Rehabilitation Act claims for any single agency, it must reject federal funds under *all* federal programs for *all* of Ohio's agencies. While neither *Dole* nor *College Savings* precisely calibrated the degree of funding leverage that constitutes coercion, it seems fair to say that if the coercion concern is ever justifiable, this is surely the case.

Finally, this case raises the important question whether Eleventh Amendment immunity constitutes an "independent constitutional bar" under *Dole*. To be sure, the Court in *Dole* seemed to limit the reach of the "independent bar" doctrine, *id.* at 210, but it did so there in the context of the Twenty-first Amendment, which merely puts the police power over alcohol under the States' control rather than under direct federal control. In that situation, the Court was justified in saying that the allocation of that power to the States was not an "independent bar" to Congress's attempt to regulate that area indirectly through its spending power. But here, in the sovereign immunity context, what is at stake is not the indirect transfer of regulatory police power, but a more fundamental restructuring of the relationship between the States, the federal legislature, and the federal judiciary. Because sovereign immunity is not merely a matter of shifting legislative power between the state and national legislatures, but instead sovereign immunity is "a constitutional limitation on the federal judicial power established in Art. III," *Seminole Tribe*, 517 U.S. at 68,

then that immunity may indeed constitute an independent constitutional bar under *Dole*.

CONCLUSION

The petition for a writ of certiorari shou'd be granted.

Respectfully submitted,

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March 2002

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 97-3933

MICHAEL D. NIHISER,
Plaintiff-Appellant

v.

OHIO ENVIRONMENTAL PROTECTION AGENCY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio at Columbus.
No. 94-01258 – James L. Graham, District Judge

Argued: October 26, 1999

Decided and Filed: October 11, 2001

Before: MARTIN, Chief Judge; SUHRHEINRICH and SILER, Circuit Judges

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COUNSEL

ARGUED: Louis A. Jacobs, Columbus, Ohio, for Appellant.

Stephen P. Carney, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellee.

Seth M. Galanter, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, Washington, D.C., for Intervenor.

ON BRIEF: Louis A. Jacobs, Columbus, Ohio, John S. Marshall, Columbus, Ohio, for Appellant.

Jack W. Decker, OFFICE OF THE ATTORNEY GENERAL, EMPLOYMENT LAW SECTION, Columbus, Ohio.

Merl H. Wayman, Columbus, Ohio, for Amicus Curiae.

Seth M. Galanter, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, Washington, D.C., for Intervenor.

OPINION

BOYCE F. MARTIN, JR., Chief Judge. Michael D. Nihiser, an employee of the Ohio Environmental Protection Agency, sued his employer under Title I of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The Agency filed a motion to dismiss, arguing that the Acts were unconstitutional as applied to the states. The district court granted the Agency's motion, and Nihiser appeals. For the following reasons, we affirm the district court's dismissal of Nihiser's Americans with Disabilities

Act claim, but we reverse the district court's dismissal of his claim brought under the Rehabilitation Act.

I.

Nihiser began working for the Ohio Environmental Protection Agency in 1978. In April 1986, he injured his back and was diagnosed with lumbar disc derangement with right sciatica. From 1986 to 1992, the Agency provided some accommodation for Nihiser, and he was able to perform his job duties. In December 1994, Nihiser sued the Agency, alleging that in 1993 the Agency changed his job duties to require prolonged periods of driving. Nihiser claimed that when he advised the Agency that his back condition prevented him from driving long distances, the Agency essentially forced him to take disability retirement in violation of the Americans with Disabilities Act and the Rehabilitation Act. On August 7, 1997, the district court granted the Agency's motion to dismiss for lack of jurisdiction, concluding that the Eleventh Amendment prevented the Agency from being sued for damages under either act.

II.

We review de novo a district court's decision to grant a motion to dismiss for lack of subject matter jurisdiction. *Joelson v. United States*, 86 F.3d 1413, 1416 (6th Cir. 1996).

The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The U.S. Supreme Court construed this Amendment to grant a

State sovereign immunity against suit brought by private citizens of any state. See *Hans v. Louisiana*, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890). States can lose or forego this immunity through waiver or congressional abrogation. See *Lawson v. Shelby County*, 211 F.3d 331, 334-35 (6th Cir. 2000) (discussing exceptions to Eleventh Amendment immunity).

A.

After Nihiser's appeal, the U.S. Supreme Court held that the Eleventh Amendment prohibits state employees from suing their employers for money damages under Title I of the Americans with Disabilities Act. *Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 148 L. Ed. 2d 866, 121 S. Ct. 955 (2001). As a state employee suing his employer under Title I, Nihiser's Americans with Disabilities Act claim is governed by *Garrett*. Therefore, we affirm the district court's dismissal of Nihiser's claim against the Agency for violations of Title I of the Americans with Disabilities Act.

B.

Nihiser and the United States as intervenor present two possible methods for Rehabilitation Act claims against States to proceed notwithstanding Eleventh Amendment immunity: 1) pursuant to Congress's spending power, waiver via the federal funds tied to the Rehabilitation Act, and 2) congressional abrogation pursuant to Section Five of the Fourteenth Amendment. They argue that the Rehabilitation Act Amendments of 1996 provide the necessary language to avoid Eleventh Amendment immunity under either theory. We will examine their waiver argument first.

1.

The Rehabilitation Act has a long history of scrutiny under the Eleventh Amendment. In 1985, the U.S. Supreme Court held that the Act's initial version fell "far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985). The next year, Congress adopted the Rehabilitation Act Amendments, which expressly provide, "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." 42 U.S.C. § 2000d-7 (1986). The U.S. Supreme Court, as well as every circuit court to address the question, has recognized Section 2000d-7 as a valid and unambiguous waiver. See *Lane v. Pena*, 518 U.S. 187, 200, 135 L. Ed. 2d 486, 116 S. Ct. 2092 (1996); see also *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (en banc); *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997).[1]

"In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the

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[1] Section 2000d-7 applies to Title IX of the Civil Rights Act in addition to the Rehabilitation Act. The only two circuits to address the question have found Section 2000d-7 to constitute an unambiguous waiver of Eleventh Amendment immunity in suits brought under Title IX. See *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999).

text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1973) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 53 L. Ed. 742, 29 S. Ct. 458 (1909)). We recognize that mere participation in a federal program is not sufficient to waive immunity, see *Edelman*, 415 U.S. at 673, but we find that Section 2000d-7 is "the most express language" of waiver of Eleventh Amendment immunity. Accordingly, we hold that a plaintiff may sue a State under Section 504 of the Rehabilitation Act, and we reverse the district court's dismissal of Nihiser's Rehabilitation Act claim.

2.

Because we find that States waive their Eleventh Amendment immunity with regard to Rehabilitation Act claims when they accept federal funds, we need not address Nihiser's second argument that Congress validly abrogated the States' Eleventh Amendment immunity when it enacted the Rehabilitation Act. We do note that the two circuits to examine the question have found Section 2000d-7 to constitute a valid abrogation. See *Kilcullen v. New York State Dep't of Labor*, 205 F.3d 77 (2d Cir. 2000); *Clark v. California*, 123 F.3d 1267 (9th Cir. 1997).

III.

For the foregoing reasons, we AFFIRM the district court's dismissal of Nihiser's Americans with Disabilities Act claim. We REVERSE the district court's dismissal of Nihiser's Rehabilitation Act claim and REMAND for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 97-3933

MICHAEL D. NIHISER,
Plaintiff-Appellant

v.

OHIO ENVIRONMENTAL PROTECTION AGENCY;
Defendant-Appellee

UNITED STATES OF AMERICA
Intervenor.

Appeal from the United States District Court for the Southern District of Ohio at Columbus.
No. 94-01258 – James L. Graham, District Judge.

Filed: December 5, 2001

Before: MARTIN, Chief Judge; SUHRHEINRICH and SILER, Circuit Judges

Upon consideration of the petition for rehearing filed by the Appellee (Ohio Environmental Protection Agency),

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green
LEONARD GREEN, CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Case No. C2-94-1258

MICHAEL D. NIHISER,
Plaintiff

v.

OHIO ENVIRONMENTAL PROTECTION AGENCY,
Defendant.

Filed: August 6, 1997

OPINION

[District Judge James L. Graham]

DISPOSITION: Defendant's motion to dismiss under Eleventh Amendment granted.

COUNSEL: For Plaintiffs: John Spenceley Marshall, Esq., Columbus, OH.

For Defendants: Jack Wilson Decker, Esq., James John Schubert, Esq., Robert Lee Griffin, Esq., David Jp. Katko, Esq., John B. Kahle, Esq., Pamela J. Vest, Esq., Ohio Attorney General, Columbus, OH.

This is an action under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 1211, et seq., and the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. §§ 791-794. Plaintiff contends that defendant violated these statutory provisions when it allegedly failed to accommodate his disability, a back injury, thereby occasioning plaintiff's resignation and constructive discharge.

This matter is before the court on the October 10, 1996 motion to dismiss filed by defendant Ohio Environmental Protection Agency. Defendant, an agency of the state of Ohio, argues that plaintiff's claims are barred by the Eleventh Amendment.

It is well established that the Eleventh Amendment prevents a federal court from entertaining a suit brought by a citizen against his own state. *Hans v. Louisiana,* 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890). The Eleventh Amendment protects state agencies where the agency is an "arm or alter ego of the state." *Hall v. Medical College of Ohio,* 742 F.2d 299, 301 (6th Cir. 1984). The Eleventh Amendment bars suits against a state and its agencies unless the state has waived its sovereign immunity or Congress has overridden it. *Quern v. Jordan,* 440 U.S. 332, 59 L. Ed. 2d 358, 99 S. Ct. 1139 (1979); *Whittington v. Milby,* 928 F.2d 188 (6th Cir. 1991).

The state of Ohio has not clearly waived its sovereign immunity from suit in the case of claims brought under the ADA or the Rehabilitation Act. The state of Ohio has only consented to suit in the Ohio Court of Claims pursuant to Ohio Rev. Code § 2743.02. Under Article I, § 16 of the Ohio Constitution, only the Ohio General Assembly may waive Ohio's sovereign immunity through

legislative action. *State of Ohio v. Madeline Marie Nursing Homes*, 694 F.2d 449, 460 (6th Cir. 1982). Plaintiff points to no statutory enactment whereby the General Assembly has done so in ADA and Rehabilitation Act cases.

Plaintiff argues that defendant waived its sovereign immunity because it is an agency which receives funds from the federal government. However, the mere fact that the state participates in a program through which the federal government provides funding to the state is not sufficient to establish the state's consent to suit. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246-47, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985) (state did not waive Eleventh Amendment by receipt of funds under the Rehabilitation Act); *Edelman v. Jordan*, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974). The state can waive its sovereign immunity when it voluntarily participates in a program where Congress has conditioned participation in the program on the state's consent to suit in federal court. *Florida Dept. of Health & Rehabilitative Services v. Florida Nursing Home Assn.*, 450 U.S. 147, 67 L. Ed. 2d 132, 101 S. Ct. 1032 (1981); Tennessee *Dept. of Human Services v. United States Dept. of Education*, 979 F.2d 1162, 1166 (6th Cir. 1992). This was not the case here. There has been no waiver of sovereign immunity by the defendant in this case.

Congress also has the authority in some cases to override the states' immunity under the Eleventh Amendment. In deciding whether Congress has effectively abrogated a state's sovereign immunity, the court must determine: (1) whether Congress has unequivocally expressed its intent to abrogate immunity; and (2) whether Congress has acted pursuant to a valid exercise of power, that is, whether the law was passed pursuant to a constitutional provision which grants Congress the power

to abrogate. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 1123-1125, 134 L. Ed. 2d 252 (1996).

The first prong of the *Seminole* test is clearly satisfied here. Title 42 U.S.C. § 2000d-7 provides that states shall not be immune under the Eleventh Amendment from suit in federal court for violations of the Rehabilitation Act under 29 U.S.C. § 794. Likewise, 42 U.S.C. § 12202 provides that states are not immune from suit under the ADA. Congress has plainly indicated its intent to abrogate the states' sovereign immunity from actions under the Rehabilitation Act and the ADA.

In regard to the second prong of the *Seminole* test, the only currently recognized authority for Congress to abrogate the states' sovereign immunity, as indicated in *Seminole*, 116 S. Ct. at 1125, consists of Congress' enactment of legislation pursuant to its enforcement powers under § 5 of the Fourteenth Amendment of the United States Constitution. Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The test for determining whether legislation was properly enacted pursuant to Congress' powers under § 5 of the Fourteenth Amendment is whether the statute: (1) may be regarded as an enactment to enforce the Equal Protection Clause; (2) whether it is plainly adapted to that end; and (3) whether it is not prohibited by, but is consistent with, the letter and spirit of the constitution. *Katzenbach v. Morgan*, 384 U.S. 641, 651, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966); *Wilson-Jones v. Caviness*, 99 F.3d 203, 209 (6th Cir. 1996).

In noting the *Katzenbach* factors, the Sixth Circuit in *Wilson-Jones*, 99 F.3d 203 at 209, made the following observations:

It is clear to us that these three *Katzenbach* factors cannot be kept so permissive as to make them collapse into the "rationally related" test generally used for the enforcement clauses of other constitutional amendments. The Fourteenth Amendment contains rather specific constitutional goals, such as the elimination of race discrimination by state actors, and also more general goals, such as the guarantee to every citizen of equal protection of the laws. The general goal of equal protection of law encompasses every facet of a citizen's interactions with government. If we were to say that an act is valid if it is rationally related to achieving equal protection of the laws, then § 5 becomes a license to Congress to pass any sort of legislation whatsoever. In reviewing such legislation, we could only ask whether the statute was a rational means to make the system of laws more rational, and the answer would always be "yes."

On the other hand, it is equally clear that Congress has broad discretion to legislate to enforce the core promises of the Fourteenth Amendment. Specifically, the Supreme Court and our circuit have been extremely deferential when reviewing under Section 5 legislation passed to enforce the ban on race discrimination by a state, to prohibit ethnic and linguistic restrictions on voting, to remedy discriminatory practices in the hiring of public contractors, or to remedy gender discrimination by state employers.

(Footnote and citations omitted).

The provisions at issue here are the accommodation requirements of the ADA and the Rehabilitation Act. Under the ADA, discrimination based upon an individual's disability has been defined under 42 U.S.C. § 12112(a)(5)(A) and (B) to include:

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applic ant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant[.]

This provision is made applicable to claims under the Rehabilitation Act through 29 U.S.C. § 794(d), which incorporates ADA standards for determining whether a violation of § 794 has occurred.

The term "reasonable accommodation" is defined in 42 U.S.C. § 12111(9) as including:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

The instant case involves accommodations such as those listed in subdivision (B) above. Plaintiff alleges that

defendant should have restructured his job or reassigned him to a vacant position.

The term "undue hardship" means an action requiring significant difficulty or expense when viewed in light of the nature and cost of the accommodation, the financial resources of the employer and the nature of the employer's business. 42 U.S.C. § 12111(10).

The first *Katzenbach* factor is whether the statute may be regarded as an enactment to enforce the Equal Protection Clause. "The simplest way to meet this requirement is for Congress to declare explicitly that the legislation is passed to enforce Fourteenth Amendment rights." *Wilson-Jones*, 99 F.3d at 210. In 42 U.S.C. § 12101(b)(4), Congress stated that one purpose of the ADA was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment ... in order to address the major areas of discrimination faced day-to-day by people with disabilities." This language indicates that in enacting the ADA, Congress intended to utilize its enforcement powers under § 5 of the Fourteenth Amendment.

No such clear statement was made in regard to the Rehabilitation Act. The Supreme Court noted in *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 472 n.2, 97 L. Ed. 2d 389, 107 S. Ct. 2941 (1987) that the Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment. However, this statement is dicta, and was supported solely by a citation to *Scanlon*, in which the question of whether Congress acted pursuant to § 5 in enacting the Rehabilitation Act was not contested or at issue.

However, courts have not required that Congress specifically refer to § 5 or the Fourteenth Amendment in the language of the statutory provisions in question. *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983); *Timmer v. Michigan Dept. of Commerce*, 104 F.3d 833 (6th Cir. 1997); *Wilson-Jones*, 99 F.3d at 208. Rather, the Sixth Circuit has construed *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981) as requiring only that a court should not "quickly attribute" to Congress an unstated intent to act under § 5 of the Fourteenth Amendment. *Timmer*, 104 F.3d 833 at 840 (quoting *Pennhurst*, 451 U.S. at 16). The relevant question is whether the court is able to discern some legislative purpose or factual predicate that supports that exercise of power. *EEOC v. Wyoming*, 460 U.S. at 243 n.18. It other words, where Congress "does not explicitly identify the source of its power as the Fourteenth Amendment, there must be something about the act connecting it to recognized Fourteenth Amendment aims." *Wilson-Jones*, 99 F.3d at 210.

Persons with disabilities are entitled to protection under the Equal Protection Clause of the Fourteenth Amendment. *City of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). One stated purpose of the Rehabilitation Act is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through ... the guarantee of equal opportunity[.]" 29 U.S.C. § 701(b)(1)(F).

Courts which have addressed the issue of whether the Rehabilitation Act may be regarded as an enactment to enforce the Equal Protection Clause have examined a

number of factors, including legislative history, the findings and purposes behind the Rehabilitation Act contained in 29 U.S.C. § 701, and the similarity between the Rehabilitation Act and the ADA, and have concluded that Congress intended to act under § 5 of the Fourteenth Amendment in enacting the Rehabilitation Act. See, e.g., *Armstrong v. Wilson*, 942 F. Supp. 1252, 1262-63 (N.D.Cal. 1996) (noting similarity between Rehabilitation Act and ADA); *Niece v. Fitzner*, 941 F. Supp. 1497, 1502 (E.D.Mich. 1996) (noting legislative history indicating that 42 U.S.C. § 2000d-7 was enacted in response to indication in *Scanlon* that Congress could abrogate Eleventh Amendment under § 5); *Mayer v. University of Minnesota*, 940 F. Supp. 1474, 1478 (D.Minn. 1996) (noting stated purposes of Rehabilitation Act); *Dept. of Educ., State of Hawaii v. Katherine D.*, 531 F. Supp. 517, 530 (D.Haw. 1982), aff'd in part, rev'd in part on other grounds, 727 F.2d 809 (9th Cir. 1983) (noting legislative history and purpose of statute).

The court concludes that Congress intended the ADA and the Rehabilitation Act to be enactments to enforce the Fourteenth Amendment.

The second *Katzenbach* factor is whether the legislation is "plainly adapted to that end," that is, "whether the means chosen by Congress fit the identified or hypothetical Fourteenth Amendment purpose." *Wilson-Jones*, 99 F.3d at 210. As the Supreme Court stated recently in *City of Boerne v. Flores*, 138 L. Ed. 2d 624, U.S. , 117 S. Ct. 2157 (1997), "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

Congress has broad discretion under § 5 to determine the appropriate means for enforcing the equal

protection guarantees of the Fourteenth Amendment. *Wilson-Jones*, 99 F.3d at 209. The enforcement powers of Congress under § 5 have been compared to Congress' powers under the Necessary and Proper Clause of the United States Constitution, Article I, § 8, cl. 18. *Katzenbach*, 384 U.S. at 650. It is not a requirement that the practice under review by Congress in itself violates the Fourteenth Amendment. Id. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Flores, 65 U.S.L.W. at 4614* (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976)). Further, "the power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989) (emphasis in original). See also *Fullilove v. Klutznick*, 448 U.S. 448, 477, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980) (authority of Congress to legislate under § 5 extends to measures regulating state action that has a discriminatory impact perpetuating the effects of past discrimination.) In discussing the Civil War Amendments, the Supreme Court has noted that an act is a valid exercise of the enforcement power if it is "rationally related" to the amendment's subject matter. *South Carolina v. Katzenbach*, 383 U.S. 301, 324, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966).

The scope of the Equal Protection Clause is not without limits. The Supreme Court stated in *Oregon v. Mitchell*, 400 U.S. 112, 126-27, 27 L. Ed. 2d 272, 91 S. Ct. 260 (1970):

While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discriminations other than those on account of race ... the Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people.

(Citations omitted).

Congress' enforcement authority under § 5 is "remedial and preventive" in nature. *Flores*, 65 U.S.L.W. at 4616. Section 5 grants Congress "the power to make the substantive constitutional provisions against the States effective" but does not award Congress the authority to substantively change the nature of constitutional rights. *Id.* at 4615-4616. The Flores Court further stated that "the power to 'legislate generally upon' life, liberty, and property, as opposed to the 'power to provide modes of redress' against offensive state action, [is] 'repugnant' to the Constitution." *Id.* at 4616 (quoting *Civil Rights Cases*, 109 U.S. 3, 15 (1883)).

The Supreme Court in Flores determined that Congress had exceeded its authority under § 5 in enacting the Religious Freedom Restoration Act of 1993 ("RFRA"). In reaching this conclusion, the Court noted that the evidence before Congress consisted of laws of general applicability which placed incidental burdens on religion. 65 U.S.L.W. at 4618. The Court concluded that the heavy burdens imposed upon the states by RFRA's use of the compelling governmental interest/least restrictive means test, including extensive litigation and the curtailing of the states' traditional regulatory powers, "far exceed any

pattern or practice of unconstitutional conduct under the Free Exercise Clause[.]" *Id.* at 4619.

Almost every court which has addressed the issue to date has concluded that the ADA and the Rehabilitation Act are statutory schemes which are rationally related to the Equal Protection Clause and plainly adapted to the enforcement to that Clause. See, e.g., *Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481 (7th Cir. 1997) (ADA within Congress' powers under § 5); *Autio v. State of Minnesota*, 968 F. Supp. 1366, 1997 WL 367013 (D.Minn. 1997); *Armstrong*, 942 F. Supp. at 1261-62; *Niece*, 941 F. Supp. at 1504; *Williams v. Ohio Dept. of Mental Health*, 960 F. Supp. 1276 (S.D.Ohio 1997) (Sargus, J.).

This court has found only one decision in which a court concluded that the accommodation provisions of the ADA were not rationally related to any right under the Fourteenth Amendment. In *Pierce v. King*, 918 F. Supp. 932 (E.D.N.C. 1996), the court faced the issue of whether the ADA was applicable to the work assignments of handicapped prisoners confined in a state prison facility. Judge Boyle noted, *Id.* at 940, that "it is unclear what Fourteenth Amendment right, if any, is vindicated by the Act." The court, Id., went on to comment:

The Fourteenth Amendment has traditionally been understood as protecting individuals from state action that would infringe upon individual liberties. The ADA, however, creates positive rights to entitlement against other individuals and state governments. Although framed in terms of addressing discrimination, the Act's operative remedial provisions demand not equal treatment, but special treatment tailored to the claimed disability. In this respect, the ADA differs radically from traditional anti-discrimination laws, such as Title VII, which seek only a

state of affairs where individuals are treated in a neutral manner without regard to race, sex, age, etc. Unlike traditional anti-discrimination laws, the ADA demands entitlement in order to achieve its goals. This the Fourteenth Amendment cannot authorize.

(Footnote omitted, emphasis in original).

In this court's view, Judge Boyle's opinion in Pierce raises serious concerns. In enacting the ADA and the Rehabilitation Act, Congress purportedly sought to remedy discrimination against the disabled. To the extent that these provisions prohibit intentional discrimination based on a person's disability in hiring, termination and other conditions of employment, these provisions meet that goal.

In contrast, the accommodation provisions of the ADA and the Rehabilitation Act demand unequal treatment for disabled employees, and in that respect are unique among other statutory provisions designed to combat discrimination. As the court noted in *Riel v. Electronic Data Systems Corp.*, 99 F.3d 678, 681 (5th Cir. 1996):

The ADA mandate that employers must accommodate sets it apart from most other anti-discrimination legislation. Race discrimination statutes mandate equality of treatment, in most cases prohibiting consideration of race in any employment decision. By contrast, an employer who treats a disabled employee the same as a non-disabled employee may violate the ADA. By requiring reasonable accommodation, the ADA shifts away from similar treatment to different treatment of the disabled by accommodating their disabilities.

The accommodation provisions also extend beyond the reach of many typical affirmative action programs. For

example, a court may require that a public employer reserve a certain number of positions in a police training class for minorities to redress past discrimination, but such employers are usually not required to provide the minority recruits with special equipment necessary to perform the job, such as uniforms, where non-minorities are not furnished such equipment at employer expense. The accommodation provisions may require an employer to provide special equipment or other benefits, such as changes in working arrangements, to which non-disabled employees are not entitled.

"Nothing in the United States Constitution requires [an employer] to accommodate [a disabled person's] condition." *Welsh v. City of Tulsa, Oklahoma*, 977 F.2d 1415, 1420 (10th Cir. 1992). Thus, in enacting the accommodation provisions, Congress created a substantive right to preferential treatment where no such right previously existed under the Equal Protection Clause.

The accommodation provisions require no congruity between the obligations of the state employer under the accommodation provisions and the injury of discrimination they are supposed to prevent. For example, it is difficult to understand, in light of traditional notions of what constitutes discriminatory animus, how the failure to modify a building constructed fifty years earlier can constitute discrimination when the original builders had no intent whatsoever of impeding the disabled from gaining access to the building. Yet, under the ADA, such a failure to accommodate was included by Congress within the statutory definition of discrimination. See 42 U.S.C. § 12112(a)(5). In spite of Congress' efforts to inject an element of discriminatory animus into the situation by defining the failure to accommodate as "discrimination," accommodation is required regardless of whether the

employer harbors any discriminatory intent or bias due to the employee's disability.

The accommodation provisions are not limited to the prevention of discrimination, but rather apply where the sole impediment to the disabled individual's ability to perform the job is the individual's disability, and where the employer is innocent of any discriminatory animus. Since they permit a remedy even where there is no injury, they are disproportionate. The accommodation provisions will place a serious financial burden upon the states.

Reasonable accommodations include: 1) accommodations that are required to ensure equal opportunity in the application process; 2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and 3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities. 29 C.F.R. § 1630.2(o). This burden may include the cost of building modifications the purchase of equipment or devices, and the hiring of qualified readers or interpreters. See 42 U.S.C. § 12111(9). Other examples of reasonable accommodations envisioned under the regulations include providing transportation, parking spaces, or a personal assistant.

The ADA and the Rehabilitation Act require only "reasonable" accommodations, and it is a defense to an action under those provisions if the accommodation would impose an undue hardship on the operation of the business of the state entity. 42 U.S.C. § 12112(a)(5). The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of factors such as the nature and cost of the accommodation needed,

the financial resources available and the nature and circumstances of the state entity. 42 U.S.C. § 12111(10). Under this rather nebulous standard it is impossible to predict the magnitude of difficulty or expense which might be required of a state employer. Indeed, as a practical matter, it is questionable whether a state would be able to successfully plead undue hardship because the state could always raise taxes to finance any accommodation that it must make to disabled employees. See *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995).

The accommodation provisions also represent a cost to the states in the form of a substantial litigation burden, both at the administrative and judicial levels. Congress found that as of 1990 there were approximately forty-three million Americans having one or more physical or mental disabilities, and that this number was growing. It is safe to assume that a comparable percentage of state employees also suffer from some form of disability, and that there is a likelihood that disputes over the accommodation of these disabilities will result in litigation.

The accommodation provisions are in essence cost-shifting provisions, the product of a determination by Congress that, regardless of whether discrimination is present, employers, not disabled individuals, are better equipped financially to incur the costs of integrating disabled employees with special needs into the workplace.

While this court certainly has no quarrel with the laudable goal of protecting the equal protection interests of disabled employees and promoting their productive participation in the workforce, the court is troubled by the concept that Congress could transfer the costs of any social program to the states by the simple and circular expedient

of defining as discrimination the failure on the part of the state employer to provide benefits to members of special interest groups. For example, Congress could conceivably conclude that minorities who are unable to attend college due to their financial circumstances are disadvantaged when applying for state government jobs, and could require the states to provide these individuals with scholarships to state universities by simply defining the failure of the states to do so as race discrimination, even though race discrimination was not a factor in any employment decision. Under this scenario, the real villain is the financial situation of the job applicants, a factor over which the states have no control, not employment discrimination based upon an impermissible consideration. Likewise, the ADA accommodation provisions require the state employer to afford benefits to the disabled employee which are not available to other employees under the guise of preventing discrimination, when the real impediments to the employee are the disability and the costs of accommodating the disability.

The court concludes that this portion of the *Katzenbach* test, that is, whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" *Flores*, 65 U.S.L.W. at 4615, has not been met.

Turning to the third *Katzenbach* factor referred to in Wilson-Jones, whether the legislation is consistent with the negative constraints of the Constitution, the court notes that the accommodation provisions require the states to provide various benefits for disabled employees to which non-disabled employees are not entitled. This raises potential issues concerning the equal protection rights of non-disabled employees.

Defendant argues that the accommodation provisions interfere with the state's sovereign powers to govern itself and to choose its own employees. The validity of this argument is tied at least to some extent to the first *Katzenbach* factor, that being whether the enactment may be regarded as one to enforce the Equal Protection Clause. In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976), the Supreme Court held that the extension of the employment discrimination prohibitions of Title VII of the Civil Rights Act of 1964 to the states was an appropriate method of enforcing the Fourteenth Amendment. The Court noted, *Id.* at 456, that Eleventh Amendment sovereignty is limited by the enforcement provisions of § 5, and that Congress, in determining what constitutes "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, may provide for private suits against states which are constitutionally impermissible in other contexts. See also *City of Rome v. United States*, 446 U.S. 156, 64 L. Ed. 2d 119, 100 S. Ct. 1548 (1980) (principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments by appropriate legislation).

However, Congress' authority to enact legislation which impacts on a state's dealings with its own employees is not without limitations. In *Gregory v. Ashcroft*, 501 U.S. 452, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991), the Court held that state court judges were not included in the class protected under the Age Discrimination in Employment Act, noting, *Id.* at 468, that "this Court has never held that the Amendment may be applied in complete disregard for a State's constitutional powers." The Court went on to observe that "the Fourteenth Amendment does not override all principles of federalism."

Chief Judge Posner, writing for the Seventh Circuit in *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996), recently expressed concerns over congressional action purportedly taken under § 5 of the Fourteenth Amendment which implicates principles of state sovereignty:

We are mindful that by progressively incorporating almost the entire Bill of Rights, expansively interpreted, into the due process clause of the Fourteenth Amendment, the Supreme Court has greatly enlarged the reach of section 5, ... and we share the state's anxiety lest the clause swallow up the remaining powers of state government. Suppose that Congress, concerned that many policemen flout Fourth Amendment rights, which are among those incorporated in the Fourteenth Amendment, passed a law requiring every state and local government to provide two weeks each year of instruction to all its law enforcement officers in the principles of the Fourth Amendment. Or forbade these governments to hire police officers who had ever been found to have violated a suspect's Fourth Amendment rights. Or required high schools to offer instruction in the law of search and seizure. These hypothetical cases and others that could be put suggest the necessity of imposing limits on the scope of the enforcement clause beyond the obvious one that it may not be used to infringe other constitutional rights. We think that in addition it may not be employed beyond reasonable limits fixed with due regard for the autonomy and responsibility of state and local government. (Citations omitted).

The accommodation provisions of the ADA and the Rehabilitation Act will impose a financial burden on state employers. In addition, the accommodation provisions also impact upon the authority of the state to define the job descriptions for each position and the qualifications needed to perform the duties required in each position. Congress

has not only created substantive rights on the part of the disabled, but has charged the states as employers with the responsibility of bearing the costs of these newly-created entitlements. These provisions constitute a substantial infringement on a traditional area of state sovereignty which is not counterbalanced by the goal of preventing or remedying constitutional violations.

After reviewing the relevant precedents and considering the *Katzenbach* factors, the court concludes that the ADA and Rehabilitation Act accommodation provisions, at least insofar as "accommodation" is defined in 42 U.S.C. § 12111(9)(B), are not a valid exercise of Congress' enforcement power under § 5 of the Fourteenth Amendment. Congress has not legally abrogated the sovereign immunity of states from suit by private persons brought under the ADA and the Rehabilitation Act, and defendant's motion to dismiss under the Eleventh Amendment is granted.

The clerk shall enter final judgment for defendant dismissing this action with prejudice at plaintiff's costs.

It is so ORDERED.

Supreme Court, U.S.
FILED

MAY 15 2002

No. 01-1357

In the Supreme Court of the United States

OHIO ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

MICHAEL D. NIHISER AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is subject to suit for disability discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, because it waived its Eleventh Amendment immunity when it applied for and accepted federal financial assistance.

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In the Supreme Court of the United States

No. 01-1357

OHIO ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

MICHAEL D. NIHISER AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 269 F.3d 626. The opinion of the district court (Pet. App. 8a-27a) is reported at 979 F. Supp. 1168.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 2001. A petition for rehearing was denied on December 5, 2001 (Pet. App. 7a). The petition for a writ of certiorari was filed on March 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a) (1994 & Supp. V 1999). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See *Olmstead* v. *L.C.*, 527 U.S. 581, 590 n.4 (1999); *Moreno* v. *Consolidated Rail Corp.*, 99 F.3d 782, 789 (6th Cir. 1996) (en banc).

In 1984, this Court held that Section 504 as written required only the "program or activity" that actually received federal funds to comply with the statutory nondiscrimination mandate. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 636 (1984). In response to *Darrone* and *Grove City College* v. *Bell*, 465 U.S. 555, 573-574 (1984), decided the same day, Congress engaged in extensive hearings and deliberations that culminated in the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28. That statute defined the term "program or activity" in Section 504 to mean, in relevant part,

> all of the operations of —
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

* * * * *

> any part of which is extended Federal financial assistance.

29 U.S.C. 794(b). Similar definitions were added to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-4a, and Title IX of the Education Amendments of 1972, 20 U.S.C. 1687, which prohibit discrimination on the basis of race and sex, respectively, by programs or activities that receive federal financial assistance.

In 1985, this Court held that Section 504 was not clear enough to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845. Section 2000d-7(a)(1) provides in pertinent part:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 *et seq.*], the Age Discrimination Act of 1975 [42 U.S.C. 6101 *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

2. Respondent Michael Nihiser was hired by petitioner in 1978. His job responsibilities included on-site visits to investigate complaints in a twenty-three

county region in southeastern Ohio. In 1986, he injured his back in an on-the-job accident which limited his ability to walk long distances or drive for prolonged periods. Respondent informed petitioner that he required an accommodation, either in the form of a more flexible schedule or reassignment to a position that did not require driving. Petitioner initially granted respondent some flexibility, but, in 1993, petitioner imposed more rigid driving requirements on respondent and declined to transfer him to a job that did not require driving. Instead, it informed respondent that if he could not perform all his job duties, he should apply for disability retirement. Pet. App. 3a; C.A. App. 51, 54, 60.

Respondent filed suit in district court, alleging that petitioner's conduct violated Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and seeking reinstatement, back pay, and damages. The district court denied petitioner's motion for summary judgment on the merits, finding that it was undisputed that respondent was an individual with a disability and that there were material issues of fact as to whether petitioner had reasonably accommodated respondent. Pet. App. 3a; C.A. App. 60.

Petitioner then filed a motion to dismiss on the grounds of Eleventh Amendment immunity, which the district court granted. The district court found that while Congress had made clear that it intended to remove States' Eleventh Amendment immunity to suits under the Disabilities Act and Section 504, it did not have the authority under Section 5 of the Fourteenth Amendment to do so. Pet. App. 11a-27a. The court further determined that petitioner had not waived its immunity to suits under Section 504 because

Congress had not "conditioned participation in the program on the state's consent to suit in federal court." *Id.* at 10a.

3. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the provisions conditioning the States' receipt of federal funding on the waiver of Eleventh Amendment immunity. The court of appeals reversed with regard to Section 504. Pet. App. 1a-6a.[1]

The court found that Congress had enacted 42 U.S.C. 2000d-7 in response to this Court's decision in *Atascadero*, which had held that Section 504 as originally written "fell 'far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.'" Pet. App. 5a (quoting *Atascadero*, 473 U.S. at 247). Examining the plain language of Section 2000d-7, the court found that Congress made clear in "the most express language" that entities like petitioner "waive their Eleventh Amendment immunity with regard to Rehabilitation Act claims when they accept federal funds." *Id.* at 6a. Because it was undisputed that petitioner received federal financial assistance, the court reversed the district court's dismissal of respondent's Section 504 claim and remanded for further proceedings. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court has denied petitions

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[1] Relying on *Board of Trustees of the University of Alabama* v. *Garrett*, 531 U.S. 356 (2001), the court of appeals affirmed the dismissal of respondent's claim under Title I of the Disabilities Act. Pet. App. 4a. Further review of that holding has not been sought.

for a writ of certiorari in *Arkansas Department of Education* v. *Jim C.*, 533 U.S. 949 (2001) (No. 00-1488), and *George Mason University* v. *Litman*, 528 U.S. 1181 (2000) (No. 99-596), cases presenting virtually identical legal claims. Accordingly, further review is not warranted.

1. Section 2000d-7 of Title 42 provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." Petitioner contends (Pet. 11-24) that that provision was not effective in putting it on clear notice that acceptance of federal funds would constitute a waiver of immunity to suit.

Petitioner argues (Pet. 11-22) that Section 2000d-7 was intended to act as a unilateral abrogation of immunity, and not as a condition with which the recipient was required to agree in order to receive the federal funds. It does not matter, however, whether Congress thought that Section 2000d-7 was a clear abrogation or a clear notice that acceptance of funds will constitute waiver. Either way, the obligation is incurred only when a recipient elects to accept federal financial assistance, and either way, Congress has not imposed the requirement on the States unilaterally. If a state agency does not wish to accept the conditions attached to the funds (non-discrimination and suits in federal court), it is free to decline the assistance. But if it does accept federal money, then it is clear that it has agreed to the conditions as well.[2] "Congress may, in the

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[2] This was the understanding at the time of Section 2000d-7's enactment. The Department of Justice explained to Congress while the legislation was under consideration, "[t]o the extent that the proposed amendment is grounded on congressional spending

exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and * * * acceptance of the funds entails an agreement to the actions." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999).

Because Congress has made it entirely clear that a State's decision to accept federal funds subjects it to suit under Section 504, there is no requirement that a state agency's assent to the waiver be manifested in a manner apart from its voluntary action in accepting the federal funds. The same is true in other settings in which the loss of Eleventh Amendment immunity is triggered by an action completely within the control of a state agency. For example, in the bankruptcy context, the courts of appeals are in agreement that after Congress made clear in 11 U.S.C. 106(b) that the effect of filing a proof of claim in a bankruptcy court would be the loss of immunity from claims arising out of the same transaction or occurrence, state agencies waive their Eleventh Amendment immunity by filing a proof of claim. See, *e.g.*, *Arecibo Cmty. Health Care, Inc.* v. *Puerto Rico*, 270 F.3d 17, 27-28 (1st Cir. 2001) (so holding and collecting cases), petition for cert. pending, No. 01-1545; see also *Lapides* v. *Board of Regents*,

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powers, [it] makes it clear to [S]tates that their receipt of Federal funds constitutes a waiver of their [E]leventh [A]mendment immunity." 132 Cong. Rec. 28,624 (1986). On signing the bill into law, President Reagan similarly explained that the Act "subjects States, as a condition of their receipt of Federal financial assistance, to suits for violation of Federal laws prohibiting discrimination on the basis of handicap, race, age, or sex to the same extent as any other public or private entities." 22 Weekly Comp. Pres. Doc. 1420 (Oct. 21, 1986).

No. 01-298 (May 13, 2002), slip op. 4-5 (discussing ability of the States to waive Eleventh Amendment immunity through litigation conduct).

Thus, the courts of appeals are in agreement that the language of Section 2000d-7 clearly forewarned recipients that acceptance of federal financial assistance would constitute a waiver of immunity to private suits alleging violations of nondiscrimination statutes and that acceptance of the federal assistance thus constitutes an agreement to the waiver. See *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001) (Section 504), petition for cert. pending, No. 01-1546; *Jim C.* v. *United States*, 235 F.3d 1079, 1081-1082 (8th Cir. 2000) (en banc) (Section 504), cert. denied, 533 U.S. 949 (2001); *Cherry* v. *University of Wisc. Sys. Bd. of Regents*, 265 F.3d 541 (7th Cir. 2001) (Title IX of the Education Amendments); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (Section 504); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000) (Title IX); *Sandoval* v. *Hagan*, 197 F.3d 484, 493-494 (11th Cir. 1999) (Title VI), rev'd on other grounds, 532 U.S. 275 (2001); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999) (Title IX), cert. denied, 528 U.S. 1181 (2000); *Clark* v. *California*, 123 F.3d 1267, 1271 (9th Cir. 1997) (Section 504), cert. denied, 524 U.S. 937 (1998).

Petitioner is incorrect in asserting (Pet. 22-24) that the Second Circuit's decision in *Garcia* v. *State University of New York Health Sciences Center*, 280 F.3d 98 (2001), is to the contrary. The Second Circuit agreed with the other courts of appeals that Section 2000d-7 "constitutes a clear expression of Congress's intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Id.* at

113. And it further agreed that, under normal circumstances, "the acceptance of funds conditioned on the waiver might properly reveal a knowing relinquishment of sovereign immunity." *Id.* at 114 n.4. However, *Garcia* also held that Title II of the ADA did not validly abrogate the States' immunity and that the Section 504 waiver was not knowing because the state agency did not "know" in 1995 (the latest point the alleged discrimination in *Garcia* had occurred) that its waiver of immunity under Section 504 would have a substantial fiscal effect, rather than simply result in liability substantially similar to that under Title II. According to the court, since "by all reasonable appearances state sovereign immunity [to claims of disability discrimination under the ADA] had already been lost" by virtue of the Title II abrogation, the State "could not have understood that in [accepting federal funds] it was actually abandoning its sovereign immunity from private damages suits" for the same disability discrimination under Section 504. *Id.* at 114.

The Second Circuit's conclusion about a knowing waiver is, in our view, incorrect.[3] Indeed, petitioner

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[3] It is wrong because every state agency did know from the plain text of Section 2000d-7 from the time it was enacted in 1986 that acceptance of federal funds constituted a waiver of immunity to suit for violations of Section 504. Section 504 was not amended or altered by the enactment of Title II of the ADA in 1990, and it was clear that plaintiffs could sue under either statute. See 42 U.S.C. 12201(b) (preserving existing causes of action). It is thus untenable to suggest that abrogation for suits under one statute is relevant to whether an entity waived its immunity to suits brought to enforce a distinct, albeit substantively similar, statute. It is clear that a waiver can be knowing and voluntary even if it was based on an incorrect understanding of the law. See *Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("a voluntary plea of guilty intelligently made in the light of the then applicable law does not

does not endorse or espouse that unprecedented view. And, contrary to petitioner's contention, the Second Circuit's opinion makes clear that at the point when there is a "colorable basis for the state to suspect" that it had retained its immunity to suit, the waiver for Section 504 is effective "because a state deciding to accept the funds would not be ignorant of the fact that it was waiving its possible claim to sovereign immunity." *Garcia*, 280 F.3d at 114 n.4. Thus, under *Garcia*, as under the other appellate decisions cited above, state agencies accepting federal funds *now* will be found to have waived their immunity to Section 504 suits. The courts of appeals are in accord, at least prospectively, as regards the amenability of States to suits under Section 504.

2. Petitioner further contends (Pet. 24-29) that Congress did not have the power to condition the receipt of federal funds on an agreement to waive immunity, either generally or as applied in this case. Those contentions do not merit further review.

a. Petitioner contends (Pet. 28-29) that Congress is prohibited from conditioning the disbursement of federal funds on a state agency's agreement to waive its Eleventh Amendment immunity because Eleventh

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become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise"); cf. *Town of Newton* v. *Rumery*, 480 U.S. 386 (1987) (plaintiff may waive the right to bring a 42 U.S.C. 1983 action for unknown constitutional violations). *Garcia*'s holding—that the waiver for Section 504 claims was effective until Title II went into effect and then lost its effectiveness until some point in the late 1990's, when a "colorable basis for a state to suspect" that the abrogation was unconstitutional developed, see *Garcia*, 280 F.3d at 114 n.4, and has now regained its full effectiveness—creates an unprecedented patchwork of effective coverage.

Amendment immunity is a "constitutional limitation" of "fundamental" importance. That argument was not pressed by petitioner below. To the contrary, petitioner acknowledged in the court of appeals that "a State agency *may* waive its immunity in order to receive federal funds." Pet. for Reh'g at 7. Moreover, the court of appeals did not address the question whether conditioning federal funds on a State's waiver of sovereign immunity is simply beyond Congress's power. This Court does not ordinarily grant review to consider questions that were neither pressed nor passed upon below. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416 (2001); see also pp. 16-17, *infra*.

In any event, petitioner's argument that Congress has no power to condition a grant of federal funds on a State's waiver of sovereign immunity is squarely foreclosed by this Court's holding in *South Dakota* v. *Dole*, 483 U.S. 203, 210 (1987), that the Spending Clause empowers Congress to condition the receipt of federal funds in order to achieve "objectives which Congress is not empowered to achieve directly" because of federalism constraints. Indeed, this Court has consistently upheld Congress's power to condition the receipt of federal funds on the recipient State's taking actions that affect its sovereign interests. "Where the recipient of federal funds is a State, as is not unusual today, the conditions attached to the funds by Congress may influence a State's legislative choices." *New York* v. *United States*, 505 U.S. 144, 167 (1992). Thus, in *New York*, this Court held that a statute in which Congress conditioned grants to the States upon the States' "regulating pursuant to federal standards" was "well within the authority of Congress" under the Spending Clause. *Id.* at 169, 173; see also *Oklahoma* v. *United*

States Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) (Congress could condition the receipt of federal money on State's appointing non-partisan disbursement officials).

Nor is there anything unique about Eleventh Amendment immunity that would bar Congress from making waiver of it a condition for receipt of federal grants. In *Alden* v. *Maine*, 527 U.S. 706, 755 (1999), this Court noted that "the Federal Government [does not] lack the authority or means to seek the States' voluntary consent to private suits. Cf. *South Dakota* v. *Dole*, 483 U.S. 203 (1987)." Similarly, in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), this Court reaffirmed the holding of *Petty* v. *Tennessee Missouri Bridge Commission*, 359 U.S. 275 (1959), which held that Congress could condition the exercise of one of its Article I powers (the approval of interstate compacts) on the States' agreement to waive their Eleventh Amendment immunity from suit. 527 U.S. at 686. At the same time, the Court suggested that Congress had the authority under the Spending Clause to condition the receipt of federal funds on the waiver of immunity. *Ibid.*; see also *id.* at 678-679 n.2. The Court explained that unlike Congress's power under the Commerce Clause to regulate "otherwise lawful commercial activity," Congress's exercise of its power to authorize interstate compacts and spend money was the grant of a "gift" on which Congress could place reasonable conditions that a State was free to accept or reject. *Id.* at 687.

Because one of the critical purposes of the Eleventh Amendment is to protect the "financial integrity of the States," *Alden*, 527 U.S. at 750, it is perfectly appropriate to permit each State to do its own cost-benefit analysis for each state agency and determine whether

to accept the federal money with the condition that the agency waive its immunity to suit in federal court, or forgo the federal funds. See *New York*, 505 U.S. at 168. Once a State makes that choice, however, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983). All the courts of appeals that have addressed the issue, both before and after *College Savings Bank*, are in accord.[4] Further review of petitioner's contention is therefore not warranted.

b. Petitioner also contends (Pet. 25-26) that, even if Congress may condition the receipt of federal funds on a waiver of immunity for valid Spending Clause statutes, Congress exceeded its authority under the Spending Clause by requiring an entire state agency to comply with Section 504's prohibition on discrimination

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[4] In addition to the cases cited on p. 8, *supra*, see *Board of Educ.* v. *Kelly E.*, 207 F.3d 931, 935 (7th Cir.) (Individuals with Disabilities Education Act), cert. denied, 531 U.S. 824 (2000); *Little Rock Sch. Dist.* v. *Mauney*, 183 F.3d 816, 831-832 (8th Cir. 1999) (same); *Department of Education* v. *Katherine D.*, 727 F.2d 809, 818-819 (9th Cir. 1983) (Education for All Handicapped Children Act of 1975), cert. denied, 471 U.S. 1117 (1985); *Scanlon* v. *Atascadero State Hosp.*, 735 F.2d 359, 361-362 (9th Cir. 1984) (Section 504), rev'd due to the absence of a clear statement, 473 U.S. 234 (1985); *Florida Nursing Home Ass'n* v. *Page*, 616 F.2d 1355, 1363 (5th Cir. 1980) (Medicaid), rev'd due to the absence of a clear statement *sub nom. Florida Dep't of Health & Rehabilitative Servs.* v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); see also *Premo* v. *Martin*, 119 F.3d 764, 770-771 (9th Cir. 1997) (state participation in Randolph-Sheppard Vending Stand Act constitutes a waiver of Eleventh Amendment immunity), cert. denied, 522 U.S. 1147 (1998); *Delaware Dep't of Health & Soc. Servs.* v. *United States Dep't of Educ.*, 772 F.2d 1123, 1138 (3d Cir. 1985) (same).

against persons with disabilities if the agency accepts any federal financial assistance.

This Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987), identified four limitations on Congress's Spending Power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." *Id.* at 207. Second, if Congress conditions the States' receipt of federal funds, it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Ibid.* (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). Third, this Court's cases "have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" 483 U.S. at 207. And fourth, the obligations imposed by Congress may not induce a governmental recipient to violate any independent constitutional provisions. *Id.* at 209-211.

Petitioner does not contest that the conditions of Section 504 serve the general welfare, see *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 443-444 (1985) (discussing Section 504 with approval), that they are clear, see *School Bd.* v. *Arline*, 480 U.S. 273, 286 n.15 (1987) (describing Section 504 as an "antidiscrimination mandate"), or that they do not require petitioner to engage in unconstitutional conduct.[5]

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[5] Petitioner does briefly suggest (Pet. 28) that a State's desire to retain its immunity from suit constitutes an "independent constitutional bar" under *Dole*. Petitioner concedes, however, that the Court in *Dole* held that "the Twenty-first Amendment, which * * * puts the police power over alcohol under the States' control * * * was not an 'independent bar' to Congress's attempt to

Instead, petitioner contends (Pet. 25-26) that the condition embodied in Section 504—that if an agency accepts federal financial assistance, it must not discriminate on the basis of disability—is not sufficiently "related" to at least some of the federal financial assistance it receives.

First, petitioner did not argue below that the breadth of the waiver required by Section 504 exceeded Congress's authority, and the court of appeals did not address any such claim. To the contrary, while petitioner asserted in the district court that there was no evidence that the division of the agency in which respondent worked had used the federal funds received by the agency, it acknowledged that no further discovery was required because the definition of "program or activity" encompassed the entire agency. R. 76; Defendant's Reply Mem. in Support of Mot. to Dismiss at 13 & n.6. Petitioner did not object to that definition on constitutional (or any other) grounds. Nor did petitioner raise the relatedness issue in either its opening brief or its supplemental brief on appeal. And as petitioner acknowledged (Pet. 26), the court of appeals did not address the contours of the "relatedness" requirement or apply it to the circumstances of this case.

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regulate that area indirectly through its spending power." *Ibid.* The same principle applies to state sovereign immunity, which is similarly "under the States' control" and similarly within Congress's ability to influence "indirectly through its spending power." Indeed, petitioner's suggestion that state sovereign immunity is an "independent constitutional bar" could be accepted only if it were the case that the Constitution barred a State from waiving its sovereign immunity—a position that petitioner does not expressly adopt and that has no support in this Court's Eleventh Amendment jurisprudence.

It is this Court's general rule that it will not grant certiorari to address arguments not pressed in, or decided by, the lower courts. See *United States* v. *Williams*, 504 U.S. 36, 42 (1992); *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 237 (1990). Since this is a court of "review, not one of first view," *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 457 (1995), the failure of petitioner to press any "relatedness" arguments below denies this Court "the benefit of a well-developed record and a reasoned opinion on the merits." *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 80 (1988).[6] While petitioner did touch on the relatedness issue in its petition for rehearing, the argument came too late to preserve it for this Court's review. See, *e.g.*, *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); see also *Costo* v. *United States*, 922 F.2d 302, 302-303 (6th Cir. 1990) ("Generally, an argument not raised in an appellate brief or at oral argument may not be raised for the first time in a petition for rehearing.").[7]

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[6] The same prudential rule applies when the question involves the Eleventh Amendment. See *Blessing* v. *Freestone*, 520 U.S. 329, 340 n.3 (1997) (declining to address Eleventh Amendment argument "which w[as] neither raised nor decided below, and w[as] not presented in the petition for certiorari"); see also *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 8 n.12 (1981) (Court would not address Eleventh Amendment issue because it was not "within the scope of the questions on which review was granted").

[7] The value of having the lower courts address questions in the first instance is evidenced in this case, where petitioner's arguments are premised on a reading of the record that the lower courts were not given an opportunity to accept or reject. The deposition of Stephen A. Scoles, petitioner's deputy director for administration, was filed with the district court (R. 72) and relied

In any event, Congress may, under the Spending Clause, require an agency that elects to receive federal financial assistance to promise not to discriminate on the basis of disability in any of its operations. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Court held that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, is a valid exercise of the Spending Power. "The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached here." 414 U.S. at 569 (citations omitted).[8] The Court reached a similar conclusion in

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upon by respondent to establish petitioner's receipt of federal financial assistance (R. 77, at 1-2, 4). The deposition revealed that petitioner was receiving grants from three federal agencies: the Environmental Protection Agency (EPA), the Department of Energy, and the Department of Transportation (R. 72, at 10, 23, 34). While there was testimony that the grants from the EPA did not fund the division in which respondent was employed (*id.* at 8), there is no testimony regarding whether any of the grants from the other two federal agencies benefitted that division. And there is some evidence that the federal funds could have done so. At least one of the grants from the Department of Energy authorized the purchase of computer and monitoring equipment that, after the project was completed, would become the sole property of the agency and could be used in any manner permitted by state law (*id.* Exh. 83, Attach. 1, at 1, Attach. 3, at 5-6). In addition, there was no evidence regarding whether petitioner used any of the funds from the approximately one hundred federal grants it received (*id.* at 7) to pay for administrative or overheard costs incurred by respondent's division. Cf. *OMB Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments*, 60 Fed. Reg. 26,484, 26,504 (1995) (describing methods of allocating indirect costs).

[8] In *Alexander* v. *Sandoval*, 532 U.S. 275, 285 (2001), this Court noted that it has "rejected *Lau*'s interpretation of § 601 [of the Civil Rights Act of 1964, 42 U.S.C. 2000d] as reaching beyond

Grove City College v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court addressed whether Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits sex discrimination in education programs by recipients of federal financial assistance, infringed the college's First Amendment rights. The Court rejected that claim, holding that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept." 465 U.S. at 575.

Petitioner urges (Pet. 25) that the condition embodied in Section 504's non-discrimination requirement is not "related" because the funds were not directed "to employment of the disabled" or to non-discrimination. But the Constitution does not require that Congress provide funds to combat discrimination or help individuals with disabilities if it wishes to attach a non-discrimination requirement to its funds. In neither *Lau* nor *Grove City* was there any suggestion that the federal funds received were targeted towards alleviating discrimination. In fact, it is clear that the financial assistance at issue in *Grove City* was simply general financial aid that had no relationship to programs to combat sex discrimination. 465 U.S. at 559, 565 n.13. Instead, those cases make clear that Congress has a legitimate interest in preventing the use of any of its funds to "encourage[], entrench[], subsidize[], or result[] in," *Lau*, 414 U.S. at 569 (internal quotation marks omitted), discrimination against persons otherwise qualified on the basis of criteria Congress has determined are irrelevant to the receipt of public

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intentional discrimination." However, the Court did not cast doubt on the Spending Clause holding in *Lau*.

services, such as race, gender, and disability. See *United States* v. *Louisiana*, 692 F. Supp. 642, 652 (E.D. La. 1988) (three-judge court) ("[T]he condition imposed by Congress on defendants [in Title VI], that they may not discriminate on the basis of race in any part of the State's system of public higher education, is directly related to one of [the] main purposes for which public education funds are expended: equal education opportunities to all citizens.") (footnote omitted).[9]

By imposing the non-discrimination condition on all of the operations of the state agency that receives any federal funds, Congress elected to be guided by each State's own governmental structure in determining the proper breadth of coverage. State law establishes the allocation of operations and functions among departments of the state government. Congress reasonably may presume, however, that States normally place related operations with overlapping goals, constituencies, and resources in the same department. That level of coverage—broader than simply the discrete program that nominally receives the funds, but narrower than the entire state government—is an appropriate means

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[9] Petitioner's suggestion that conditions cannot be "related" to the purpose of the federal spending unless they involve the subject-matter of a particular grant also conflicts with cases outside the civil rights area upholding, as valid exercises of the Spending Clause, conditions not tied to a particular spending program. See *Oklahoma* v. *United States Civil Serv. Comm'n*, 330 U.S. at 129 n.1 (upholding an across-the-board requirement in the Hatch Act that no state employee whose principal employment was in connection with any activity that was financed in whole or in part by the United States could take "any active part in political management"); *Salinas*, 522 U.S. at 60-61 (upholding application of federal bribery statute covering entities receiving more than $10,000 in federal funds).

of achieving the legitimate and entirely constitutional goal of ensuring that no federal money supports or facilitates programs that are not accessible to people with disabilities. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 197-199 (1991) (Congress may constitutionally require that a private entity that receives federal funds not engage in conduct Congress does not wish to subsidize so long as recipient may restructure its operations to separate its federally-supported activities from other activities).

c. Petitioner also suggests (Pet. 27-28) that Section 504 is unconstitutionally coercive. This Court pointed out in *Dole* that its "decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 590 (1937)). But the only case cited in support of that proposition in *Dole* was *Steward Machine*, a decision that expressed doubt about the viability of such a theory. 301 U.S. at 590 (finding no undue influence even "assum[ing] that such a concept can ever be applied with fitness to the relations between state and nation"). Every congressional spending statute "is in some measure a temptation." *Dole*, 483 U.S. at 211. As the Court recognized, however, "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties." *Ibid.* In *Dole* the Court reaffirmed the assumption, founded on "a robust common sense," that the States voluntarily exercise their power of choice when they accept or decline the conditions attached to the receipt of federal funds. *Ibid.* (quoting *Steward Mach.*, 301 U.S. at 590).

Petitioner has not identified anything about Section 504 that overbears a sovereign State's ability to say

"no" to the offer of federal funds for any agency it does not want to be subjected to the non-discrimination requirements of Section 504. Petitioner notes (Pet. 27) that it will have to elect not to seek federal funds for an entire agency if it wishes the agency to be free of Section 504's obligation not to discriminate and attendant waiver of immunity.[10] That is also true under Title VI and Title IX, statutory schemes whose legality was upheld in *Lau* and *Grove City*, as well as the Equal Access Act, 20 U.S.C. 4071 *et seq.*, a statute that prohibits any public secondary school that receives any federal financial assistance and maintains a "limited open forum" from denying "equal access" to students based on the content of their speech. 20 U.S.C. 4071(a). In interpreting the scope of the Equal Access Act in *Board of Education of the Westside Cmty. Schs.* v. *Mergens*, 496 U.S. 226 (1990), this Court rejected the school district's argument that the Act as interpreted unduly hindered local control, noting that

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[10] Petitioner suggests (Pet. 27-28) that the court of appeals held that the entire State, and not just the relevant state agency, waived its immunity if any part of the State received federal financial assistance. To the extent the panel opinion can be read in that manner, we agree that it improperly describes the scope of the waiver. See *Nelson* v. *Miller*, 170 F.3d 641, 653 n.8 (6th Cir. 1999) (Section 504 limited to agency that receives federal funds). However, this Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), and does not "decide questions that cannot affect the rights of litigants in the case before them." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (internal quotations omitted). Since there is no dispute in this case that petitioner was an agency that received federal financial assistance that triggered coverage under Section 504 (Pet. 9), the broad language in the opinion, if construed as petitioner suggests, is at most dicta, and it has no bearing on the proper disposition of this case.

> because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, * * * [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups.

Id. at 241 (citation omitted). Similarly, compliance with Section 504 and waiver of the State's sovereign immunity with respect to claims brought against a particular agency is the price that agency must pay if it elects to remain federally funded. See also *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532, 536 (E.D.N.C. 1977) (three-judge court) (threat of exclusion from 40 federal spending programs unless State enacts particular legislation not "'coercive' in the constitutional sense"), aff'd mem., 435 U.S. 962 (1978). In addition, the State's ability to define and allocate the functions of its state agencies also minimizes the threat of coercion.

Thus, the choice imposed by Section 504 is not impermissibly "coercive" in the constitutional sense. State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funding, each department or agency of the State, under the control of state officials, is free to decide whether it will accept the federal funds with the Section 504 and waiver "string" attached, or simply decline the funds. See *Grove City*, 465 U.S. at 575; *Kansas* v. *United States*, 214 F.3d 1196, 1203-1204 (10th Cir.) ("In this context, a difficult choice remains a choice, and a

tempting offer is still but an offer. If Kansas finds the * * * requirements so disagreeable, it is ultimately free to reject both the conditions and the funding, no matter how hard that choice may be. Put more simply, Kansas' options have been increased, not constrained, by the offer of more federal dollars.") (citation omitted), cert. denied, 531 U.S. 1035 (2000).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 01-1357

In The Supreme Court Of The United States

OHIO ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

MICHAEL D. NIHISER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The State of Ohio seeks review of a Sixth Circuit decision that found that a Congressional enactment, 42 U.S.C. 2000d-7, acts as a "valid and unambiguous waiver" of Ohio's sovereign immunity from private Rehabilitation Act lawsuits. Pet. App. 6a. This is so, said the appeals court, because Congress intended for a waiver to result, and because the Ohio Environmental Protection Agency accepted federal funds.

The decision below squarely conflicts with this Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), for that case says that a State's waiver requires more than a clear statement from *Congress*, but instead requires a clear declaration of waiver *by the State*. *Id.* at 676, 680. Further, under *College Savings*, only an express waiver will do; the doctrine of so-called "constructive waiver" was abolished. In Ohio's view, the "waiver" that Ohio purportedly effected here—namely, "waiver by acceptance of funds"—is precisely the type of constructive waiver that no longer suffices. And Congress's purported "invitation to waive" was not even a clear notice to States to begin with, as Section 2000d-7's "shall not be immune" language was an attempt to abrogate, as this Court has repeatedly acknowledged. *See* Petition at 18, citing, *e.g.*, *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72 (1992) ("In . . . 42 U.S.C. 2000d-7, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975").

The United States responds that the decision below was correct, and it denies any conflict between the decision below and this Court's decisions. *See* Brief of the United States (U.S. Br.) at 5. These contentions are wrong, and the

United States' response shows why review here is warranted.

1. While Respondent denies any conflict with the Court's decisions, Respondent's primary approach to the key case—*College Savings*—is simply to ignore its holding. Respondent does not directly cite or acknowledge the parts of *College Savings* that Ohio discussed extensively in our Petition: the Court's requirement of a "'clear declaration' by the State of its waiver,'" *id.* at 680, and the Court's explanation of the "fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *Id.* at 680-81. Respondent does, of course, claim that Congress's statute is adequate, and that the State's acceptance of funds constitutes a clear agreement to waive, but it never aligns those assertions with the relevant *College Savings* rules. *See* U.S. Br. at 6-7.

Respondent's failure to align its arguments with the requirements of *College Savings* is telling, and the omission glares even brighter upon such an alignment. Respondent says that when "the State accept[s] federal money, then it is clear that it has agreed to the conditions as well." U.S. Br. at 6. This "agreement" is clear, says Respondent, because the State accepts funds in the face of a clear warning by Congress that, one way or another, Congress intends for recipients to lose immunity. *See id.* But this description of the Congress-State dialogue is uncannily similar to what the Court *rejected* in *College Savings* when it contrasted a true State declaration of waiver with "Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *Id.* at 680-81.

To bolster the proposition that accepting-funds-is-a-clear-waiver, Respondent cites the acknowledgement in *College Savings* that "Congress may . . . condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and . . . acceptance of the funds entails an agreement to the actions." U.S. Br. at 7, quoting *College Savings*, 527 U.S. at 686. But this language in *College Savings* was merely an acknowledgement that such a general principle was adopted in *South Dakota v. Dole*, 483 U.S. 203 (1987). In acknowledging that *Dole* generally allows Congress to purchase State action—including State actions other than an immunity-waiver, such as a change in substantive legislation—the Court surely did not undermine the more specific holding in *College Savings* that when Congress seeks to buy a waiver of immunity, only the utmost clarity will do.

Further, the *College Savings* passage cited by Respondent cites *Dole*, and that means that *Dole's* requirements for all Spending Clause legislation are triggered. *Dole* not only sets substantive limits, such as relatedness, but *Dole* also independently requires clarity in the State-Congress dialogue, as it requires that "if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207. Here, Respondent holds up Section 2000d-7 as such an "unambiguous" Congressional statement, yet it argues that it "does not matter . . . whether Congress thought that Section 2000d-7 was a clear abrogation or clear notice that acceptance of funds will constitute waiver." U.S. Br. at 6-7. This is partly correct, in that Congress's *intent* alone does not matter—but what does matter is whether

Congress's words objectively manifested a clear notice to States that Congress was inviting a waiver, and whether the State then accepted that invitation with a "clear declaration" of waiver. *See College Savings*, 527 U.S. at 680. Respondent offers no express explanation of how to reconcile its "does not matter" suggestion, which allows that the statute may mean one thing or another, with the "unambiguous" requirement. Respondent's view seems to be that Congress can satisfy the clear statement rule with a clear statement of its "general intent" to remove immunity, without any clarity on its specific intent to do so by one path or another. But this Court has always insisted on a clear statement of abrogation, or a clear invitation to waiver, and has never blessed this either-or approach.[1]

2. Further, Respondent's (and the Sixth Circuit's) view of Section 2000d-7 as a waiver provision cannot be reconciled with this Court's repeated description of the Statute as an abrogation provision. *See* Pet. at 18; *Franklin*,

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[1] Respondent incorrectly asserts that this Court has previously denied petitions for certiorari in two cases that, according to Respondent, "present[ed] virtually identical legal claims." U.S. Br. at 6, citing *Arkansas Department of Education v. Jim C.*, 533 U.S. 949 (2001) (No. 00-1488), and *George Mason University v. Litman*, 528 U.S. 1181 (2000) (No. 99-596). While those two petitions involving Section 2000d-7 were denied, the claims were nowhere near "identical" to Ohio's, as those petitions did not challenge, as Ohio does here, whether Section 2000d-7 triggers a valid waiver under *College Savings*'s dual clear-statement requirements. Those petitions limited their challenges to Congress's Spending Clause power, as Ohio does in its second question presented here, but those petitions conceded the first issue. *See* Brief of the United States in 00-1488 at 9 ("Petitioner does not argue that Congress did not clearly express its intention in 42 U.S.C. 2000d-7 to condition the receipt of federal funds on the recipient's waiver of its Eleventh Amendment immunity to Section 504 suits"); Brief of the United States in 99-596 at 7 (same concession regarding Title IX suits).

503 U.S. at 72. While Respondent insists that it "does not matter" whether Section 2000d-7 is an abrogation provision or a waiver provision, Respondent never explains whether it now views the statute as a waiver provision across-the-board—so that it invites waiver rather than abrogates as to Title VI and Title IX, as well as for Section 504 of the Rehabilitation Act—or whether the provision now does simultaneous double-duty, acting to abrogate for Title IX while acting to "invite a waiver" for Section 504. The first view of course conflicts with *Franklin* and other cases (*see* Pet. at 18), while the second means that the statute, far from being unambiguous, operates on an ongoing basis with two meanings. This curious state of affairs warrants review.

3. The Court should also review Ohio's second question presented, which challenges Congress's power under the Spending Clause to extract a waiver-of-immunity, as to disability discrimination lawsuits, by virtue of providing environmental cleanup funds. Respondent incorrectly asserts that the power issue was not pressed below, when in fact Ohio argued the point to the Sixth Circuit before oral argument and before the panel decision, as well as in a rehearing petition. Ohio admittedly blended its constitutional-power argument into its statutory argument, but the argument's text leaves no doubt that Ohio grounded part of its argument in *Dole*, and in the *Dole* prongs of coercion and relatedness. Ohio cited *Dole*, *see* Supp. Brief at 15, and it quoted *Dole's* discussion of coercion, *id.* at 16, 18. Ohio cited the Eighth Circuit's decision in *Bradley v. Arkansas Department of Education*, 189 F.3d 745 (1999), overruled *en banc sub. nom., Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000), *cert. denied*, 533 U.S. 949 (2001), and it distinguished the Fourth Circuit's decision in *Litman v. George Mason Univ.*, 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000). *Id.* at 19-20. Ohio also noted the relatedness

problem, quoting *New York v. United States* for the principle that "conditions must . . . bear some relationship to the purpose of the federal spending; otherwise, of course, the spending power could render academic the Constitution's other grants and limits of federal authority." *Id.* at 20, quoting *New York v. United States*, 505 U.S. 144, 167 (1992).

Thus, while the Sixth Circuit did not address the issue, and while it was not featured as prominently as other issues in the case, it was more than adequately preserved. And in any event, the constitutional concerns remain relevant to the statutory issue because they implicate the need to construe the statute, if possible, to avoid constitutional problems.

4. Respondent concedes that the Sixth Circuit erred "to the extent" that the opinion "can be read" to hold that a State agency's acceptance of funds triggers a waiver by the entire State, and not just the relevant agency. U.S. Br. at 23 n.10. Respondent insists that this conceded error has no consequence, as the appeals court's overly broad language is "at most dicta." *Id.*

But the Sixth Circuit itself has plainly treated its view of "statewide waiver" as a *binding holding*, not as dicta, as shown by a subsequent decision, which Ohio noted in the Petition (at 27-28), and which Respondent ignores. The court held in that case that it had already "concluded that Ohio unambiguously waived" its immunity in its *Nihiser* decision, so it allowed a Rehabilitation Act suit to go forward against Kent State University without any inquiry into whether that entity received federal funds. *Carten v. Kent State Univ.*, 282 F.3d 391 (6th Cir. 2002). This "statewide waiver" holding is important to *Dole's* coercion prong, because it is coercive to force a state to

forgo *all* federal funding to *all* agencies in order to preserve immunity for any one agency.

5. Finally, to the extent that cases such as *Grove City College v. Bell*, 465 U.S. 555 (1984), and *Lau v. Nichols*, 414 U.S. 563 (1974), do support, as Respondent argues, the notion that *Dole's* relatedness inquiry does not apply to anti-discrimination laws, that factor weighs in favor of review, so that the Court may resolve the seeming tension between those cases and the firm dictate of *Dole* that all Spending Clause legislation must satisfy the relatedness inquiry.

CONCLUSION

For the reasons above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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